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In the

Supreme Court of the United States

IRA ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 3, 2010

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QUESTIONS PRESENTED

1. May a District Court Judge recuse himself in the middle of a criminal jury trial (obscenity case) pursuant to 28 U.S.C. § 455(a) if he allegedly is judicially imprudent for maintaining a web site that contains sexually explicit (but not obscene) material if his recusal necessitates a mistrial?

2. If a District Court Judge recuses himself in the middle of a criminal jury trial, whether properly or not, over the defendant's objection, may the District Court declare a mistrial (also over the defendant's objection) and compel a retrial instead of allowing another judge to replace the recused judge?

3. Is the right of a defendant in a criminal jury trial not to be placed in double jeopardy under the Fifth Amendment to the United States Constitution violated when he is ordered to stand trial a second time because the District Court Judge unilaterally recused himself because of embarrassment over a newspaper article and unilaterally declared a mistrial without providing for a replacement judge pursuant to Rule 25 of the Federal Rules of Criminal Procedure or pursuant to stipulation?

PARTIES TO THE PROCEEDINGS

Petitioner: Ira Isaacs is the defendant in a pending criminal case in the Central District of California

Respondent: The United States of America

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved . 2

Statement of the Case 3

Statement of Procedural History 15

Reasons for Granting the Writ 16

I Certiorari Should Be Granted to Allow this Court to Determine Whether a District Court Judge May Recuse Himself in the Middle of a Criminal Jury Trial Because of Embarrassing Newspaper Articles 16

II There Is a Split among the Circuit Courts on the Question as to Whether a Replacement Judge Can Replace a Judge Who Has Recused Himself in the Middle of a Criminal Jury Trial to Allow the Replacement Judge

to Continue with the Trial to Avoid a Mistrial. 23

Conclusion 30

Appendices

Appendix A: Ninth Circuit Memorandum (Dec. 22, 2009) 1a

Appendix B: District Court Order Denying Defendant's Motion to Dismiss Indictment with Prejudice (Sept. 19, 2008) 5a

Appendix C: District Court Order Recusing (June 13, 2008) 17a

Appendix D: Ninth Circuit Order re rehearing and rehearing en banc (Feb. 3, 2010) 19a

TABLE OF AUTHORITIES

Cases

Abney v. United States,
431 U.S. 651 (1977) 1

Arizona v. Washington,
434 U.S. 497 (1978) 27, 28

Chandler v. Judicial Council,
398 U.S. 74 (1970) 21

Cheney v. U.S. Dist. Court,
541 U.S. 913 (2004) 22

Gori v. United States,
367 U.S. 364 (1961) 28, 29

Illinois v. Somerville,
410 U.S. 458 (1973) 28

In re Complaint of Judicial Misconduct,
575 F.3d 279 (3rd Cir. 2009) 12, 14, 15

Laird v. Tatum,
409 U.S. 824 (1972) 21

Liljeberg v. Health Servs. Acquisition Corp.,
486 U.S. 847 (1988) 19

Liteky v. United States,
510 U.S. 540 (1994) 20, 21

Richardson v. United States,
468 U.S. 317 (1984) 27

Sattazahn v. Pennsylvania,
537 U.S. 101 (2003) 27

United States v. Dinitz,
424 U.S. 600 (1976) 30

United States v. Jaramillo,
745 F.2d 1245 (9th Cir. 1984) cert.den., 471 U.S.
1066 (1985) 20, 23, 24, 25, 26

United States v. Jorn,
400 U.S. 470 (1971) 28, 29

United States v. Perez,
9 Wheat. 579 (1824) 27

United States v. Sartori,
730 F.2d 973 (4th Cir. 1984) 23, 25, 26

Constitutional Provisions

U.S. Const. amend. V 2, 14, 23, 29

Statutes

18 U.S.C. § 1462(a) 4, 5
18 U.S.C. § 1465 ..... 4, 5
18 U.S.C. § 2257(f)(4) 4
28 U.S.C. § 455(a) 2, 16, 17, 18, 20
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 1
28 U.S.C. § 1291(b) 5

Rules

Fed. R. Crim P. 25(a) 2, 14, 23, 26
Sup. Ct. R. 13(3) 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Ira Isaacs ("Isaacs") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed on December 22, 2009. On February 3, 2010 the Ninth Circuit denied a petition for rehearing and for rehearing en banc.

OPINIONS BELOW

The unpublished "Memorandum" of the United States Court of Appeals for the Ninth Circuit filed December 22, 2009 is Appendix A.

The unpublished "Order Denying Defendant's Motion to Dismiss Indictment with Prejudice" filed on September 19, 2008 by the District Court is Appendix B.

The unpublished "Order Recusing" filed by the United States District Court for the Central District of California on June 13, 2008 is Appendix C.

The unpublished "Order" denying the petition for rehearing and for rehearing en banc filed February 3, 2010 is Appendix D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit exercised its appellate jurisdiction to review an order denying a motion to dismiss on double jeopardy grounds pursuant to 28 U.S.C. § 1291 and Abney v. United States, 431 U.S. 651, 659 (1977). On December 22, 2009 a three judge panel of the Ninth Circuit

affirmed the Order of the District Court in an unpublished Memorandum (Appendix A) and denied a timely filed petition for rehearing and rehearing en banc on February 3, 2010 (Appendix D).

This Petition for a Writ of Certiorari is filed within 90 days of the denial of the petition for rehearing and rehearing en banc. See Rule 13(3). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to United States Constitution:

> "No person shall '. . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .'"

Title 28, United States Code, Section 455(a):

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Rule 25(a) of the Federal Rules of Criminal Procedure:

> "(a) During Trial. Any judge regularly sitting in or assigned to the court may complete a jury trial if:
>
> (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record."

STATEMENT OF THE CASE

The facts of this case are not in dispute. This includes both the facts to be tried as well as the procedural facts leading up to the double jeopardy dismissal motion. The following facts are taken from the Government's Brief filed with the Ninth Circuit, pages 6-7 and pages 10-22 (with footnotes omitted).

In February 2004, FBI Agents investigating the use of the Internet to distribute allegedly obscene material uncovered evidence linking Petitioner Isaacs (operating through his Los Angeles, California-based business LA Media) to at least twenty different web sites that sold movies containing graphic depictions of scenes of bondage and violence, defecation, urination, sadomasochism, bestiality, "scat" (*i.e.*, the use or ingestion of feces), and "bukakke" (*i.e.*, sex involving multiple males who ejaculate on a single female). Tr. (6/11/08) 34-40, 58-59.

In May 2004, and July and October of 2006, FBI agents acting in an undercover capacity purchased a number of these movies from two of Isaacs' websites, www.scatmovies.com and www.stolencarfilms.com. The movies were subsequently mailed to the prearranged undercover locations by LA Media using United Parcel Service (UPS). Tr. (6/11/08) 41-46; Gov't Ex. 24.

On January 17, 2007, agents executed a search warrant at LA Media's offices. A subsequent review of image copies of the hard drives that were found in

those offices disclosed files indicating that Ira Isaacs "owned the business, ran it, [and] developed the movies." TR (6/11/08) 55. Agents also recovered master copies of three movies – Gang Bang Horse Pony Sex Show, Mako's First Time Scat and Hollywood Amateurs Number 7 – which agents had purchased in the three aforementioned undercover buys. *Id.* At 55-56. During a consensual, non custodial interview with agents, Isaacs admitted that he was the sole proprietor of LA Media, and that he knew that the material he distributed ranged from voyeur movies all the way to bestiality and scat movies. *Id.* At 58. He also acknowledged that most purchases of his movies were made via the Internet, and that he would ship the movies to purchasers via UPS. *Id.* At 58-59

On July 24, 2007, a federal Grand Jury in the Central District of California returned an 8-Count indictment charging Petitioner Isaacs, doing business as LA Media, with importing or transporting obscene material for sale or distribution, in violation of 18 U.S.C. § 1465; importing or transporting obscene material, in violation of 18 U.S.C. § 1462(a) (counts 5 and 6); and improper record keeping for material depicting sexual activity, in violation of 18 U.S.C. § 2257(f)(4) (counts 7 and 8). Dkt. 1, E.R. 1-7.

The case was assigned to U.S. District Court Judge George H. King, who conducted various pretrial proceedings and heard a number of pre trial motions and resolved certain pretrial issues. During the time the case was still pending before Judge King the Government dismissed counts 7 and 8 of the indictment.

After Judge King made certain rulings and after the Government dismissed counts 7 and 8 of the indictment, the case was reassigned to Ninth Circuit Chief Judge Alex Kozinski in March 2008 pursuant to 28 U.S.C. § 1291(b) (authorizing circuit court judges to serve temporarily as district court judges).

On June 9, 2008 the jury trial began before Judge Kozinski at the United States Courthouse, in Los Angeles. Just prior to the commencement of the jury selection the District Court granted the Government's motion to dismiss counts 4 and 6. Thus, what remained to be decided by the jury were counts 1, 2, 3, and 5 and as to Counts 1, 2, and 3 (18 U.S.C. § 1465) and Count 5 (18 U.S.C. § 1462(a)), which involved three movies, the only issue was whether the movies were legally or factually obscene. The Government and the defense had already filed a stipulation with the Court regarding the facts of the case. Based upon the stipulation the only issue remaining was the obscenity issue.

Jury selection began on Monday, June 9, 2008 and continued through the following afternoon, June 10, 2008, at which time the jury was impaneled and sworn.

Following the Court's preliminary instructions and counsels' opening statements on Wednesday, June 11, 2008, the Government began its case by presenting the testimony of an FBI agent and a former employee of LA Media and a reading of the factual stipulation to the jury that the movies at issue were purchased on line and mailed by LA Media via United Parcel Service. Tr. (6/11/08) 33-81; Government Exh. 24. The

Court then excused the jury for lunch until 2:30 P.M. TR (6/11/08) 85.

The Initial L.A. Times Story. While the morning session of the trial was ongoing, the Los Angeles Times released an article on its Internet website, www.latimes.com, in which it reported that Chief Judge Kozinski had, over a period of several years, maintained "a publicly accessible website featuring sexually explicit photos and videos." Scott Glover, *Judge In Obscenity Case Put Explicit Photos On Web,* L.A. Times (June 11, 2008), E.R. 86. According to the article, the sexual content found on this website, http://alex.kozinski.com, was "extensive," and included (1) "a photo of naked women on all fours painted to look like cows"; (2) "a video of a half-dressed man cavorting with a sexually aroused farm animal"; (3) "images of masturbation, public sex and contortionist sex"; (4) a "slide show striptease featuring a transsexual", and (5) a folder that contained a series of photos of women's crotches as seen through snug fitting clothing or underwear." *Id.* The report also stated that the website had pictures and videos involving "themes of defecation and urination," albeit not "in a sexual context." *Id.*

The article also reported that, during an interview with a reporter on Tuesday evening, Chief Judge Kozinski "acknowledged * * * that he had posted the materials"; "conceded" that [s]ome of the material was inappropriate" though not legally obscene; and "defended other sexually explicit content as "funny." *Id.* The article also reported that Chief Judge Kozinski had stated to the reporter that he had agreed to remove "some material" from his website, "including the photo depicting women as cows," which, the article

indicated, he now deemed "degrading * * * and just gross." *Id.* And, the article further noted that Chief Judge Kozinski had agreed to "get rid of a graphic step-by-step pictorial in which a woman is seen shaving her pubic hair." *Id.* And, when asked "whether the contents of his site should force him to step aside "from the Isaacs' trial, the article reported that Chief Judge Kozinski "declined to comment."

Chief Judge Kozinski's Initial Discussion With Counsel. At 2:15 p.m., Chief Judge Kozinski met with counsel, outside the jury's presence, "to take up the story in the LA Times this morning." Tr. (6/11/08) 86, Gov't E.R. 1. While declining to "comment on the story," Chief Judge Kozinski did state that he "did not know about it before the jury was sworn and jeopardy attached, *id.*, but "found out about it yesterday after court." *Id.* As a result, he "want[ed] to give the parties an opportunity to think about whether they wish to move to disqualify [him]," *id.,* and asked counsel "[w]hat would be a reasonable time for you to think about it." *Id.*

The prosecutor stated that he and his supervisor had been conferring with officials at the Department of Justice in Washington, D.C. "about what position we should take if at all," and indicated his belief that "we will have a response tomorrow." Tr. (6/11/08) 87, Gov't E.R. 2. Isaacs' counsel began by stating that he had been contacted by the individual whom he believed was "the source of what happened," *id.* at which point the Court reiterated that it did not "really have any comments on the merits of the story," but that it "recognize[d] that this is a situation where it is confidence in judicial qualifications and I viewed it seriously." *Id.* Isaacs' lawyer then interrupted the

Court mid-sentence, stating "[w]e would oppose any disqualification, and if the court were to do that, we would seek appellate remedy to oppose recusal. We oppose a mistrial. We want to go forward." *Id.*

Chief Judge Kozinski responded by stating "I am very sorry," and reiterating that he "did not know about this before the jury was sworn. And I – I have nothing else to say, and I hope we will go forward, but I will certainly understand if the parties feel otherwise." *Id.* At that point, the colloquy concluded, and, while the Court was discussing logistical arrangements concerning the viewing of the movies, an "unidentified reporter" asked whether he will "have anything to say about the story," Tr. (6/11/08) 89, Gov't E.R. 4, to which the Court stated "[w]e are on the record now. I have nothing to say." *Id.*

The trial then resumed with the government's visual presentation of the first movie, Tr. (6/11/08) 91; Gov't Ex. 2 (copy of movie), admitted in evidence, *id.* at 47, and then its presentation of most, but not all, of the second movie. Tr. (6/11/08) 94; Gov't Ex. 12 (copy of movie), admitted in evidence, *id.* at 42.

Chief Judge Kozinski's Second Discussion With Counsel. During the afternoon recess, Chief Judge Kozinski held a second colloquy with counsel, again outside the jury's presence. Tr. (6/11/08) 93-94, Gov't E.R. 8-9. The prosecutor began by stating that, based on "the matters that the government is aware of at this point," the government had some concerns about what the prosecutor labeled a "potential conflict of interest" in the Court's continued participation in the trial based on the fact that the material reported to have been found on the Court's website had "arguably

the same or similar material to what is on trial here." Tr. (6/11/08) 94, Gov't E.R. 9. To "get a better understanding of where we are at this posture," *id.*, the prosecutor requested a two-day continuance of the trial (until Monday, June 16, 2008), which, the prosecutor explained, would allow the government some additional time to "research the issues from a double jeopardy standpoint" and thereby inform the government's position. *Id.*

Isaacs' counsel "oppose[d] the government's request" for a continuance, Tr. (6/11/08) 96, Gov't E.R. 11, because the article, "[a]s far as I can see * * * has suggested no wrongdoing, no criminal acts, no improper conduct on the part of the court." *Id.* Calling the matter a "nonissue," *id.*, counsel expressed his "confiden[ce] the court can go forward and judge this case fairly and impartially," and saw "no need for a stay" because "the court has done nothing wrong." *Id.* Counsel then asserted that "[t]his is intimidation by the government against the court," *id.*, and stated that, just as he was unconcerned, "[t]he government should not be concerned about it either," Tr. (6/11/08) 97, Gov't E.R. 12, because "any investigation would not lead to any finding of any wrongdoing by the court at all." *Id.*; see also *id.* (I think it is a big hoop-tee-do over nothing.").

After some additional back-and-forth, *id.* at 97-98, Gov't E.R. 12-13, the government reiterated its request to continue the trial until Monday, at which point Isaacs' counsel stated "[t]he private, lawful conduct of the court is not the concern of the government." Tr. (6/11/08) 98, Gov't E.R. 13. To that assertion, the court replied that "they are entitled to make a motion to disqualify, and they are entitled to make one based on

research and evidence, and nobody would even think about whether it is justified or not." *Id.* at 98-99, Gov't E.R. 13-14. The Court then stated that its "personal preference would be to walk away," *id.* at 99, Gov't E.R. 14, and that "[i]f I thought I could responsibly, that is what I would do, but here we are and much is at stake." *Id.* After some additional discussions, the Court stated that it "could just as soon wait a couple of days to see the rest of this," *id.* at 100, Gov't E.R. 15, in view of the fact that "the government needs more time, obviously to determine whether to make a motion." *Id.* at 101, Gov't E.R. 16.

At that point, Isaacs' counsel, following a brief consultation with his client, stated "[w]e have no objection to what the court's preference is which apparently is to halt the proceedings today for two days. My client does not object to that. So if that is the court's preference, then we will go along with that." Tr. (6/11/08) 101-102, Gov't E.R. 16-17. That comment prompted the court to state that it had just witnessed "a complete flipping of positions," *id.* at 102, Gov't E.R. 17, to which Isaacs' counsel replied, "I just consulted with my client," *id.*, and to which Isaacs himself added that "I think everybody should have time to think about things, and we shouldn't rush through this, and I don't want to rush through it." *Id.*

The Court then granted what it termed the "joint motion to adjourn until Monday," *id.* at 102-103, Gov't E.R. 17-18, and excused the jury until that time, with a request that the jury "not listen to any media reports or anything about [the trial] and don't discuss it with your family and friends." *Id.* at 105, Gov't E.R. 20.

Thursday, June 12, 2008

The Second L.A. Times Story. On Thursday, June 12, 2008, the Los Angeles Times issued a follow-up story reporting that, during an interview with one of its reporters, Chief Judge Kozinski "acknowledged" that he "maintain[ed] his own publicly accessible Web site featuring sexually explicit photos and videos." Scott Glover, *Judge Maintained Web Site With Explicit Photos*, L.A. Times (June 12, 2008), E.R. 90. According to the article Chief Judge Kozinski "defended some of the adult content as 'funny' but conceded that other postings were inappropriate," *id.*; at the same time, the article noted that the material in Isaacs' case was "considerably more vulgar than the content posted on [Chief Judge] Kozinski's website." *Id.*, E.R.91.

Chief Judge Kozinski Requests A Judicial Council Investigation. That afternoon, Chief Judge Kozinski issued the following written statement on official letterhead:

> I have asked the Judicial Council of the Ninth Circuit to take steps pursuant to Rule 26 of the Rules Governing Judicial Conduct and Disability, and to initiate proceedings concerning the article that appeared in yesterday's Los Angeles Times. I will cooperate fully in any investigation.
>
> /s Alex Kozinski[1]

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[1] On June 16, 2008 the Ninth Circuit's Judicial Council entered an order pursuant to Rule 26 and Chief Judge Kozinski's statement (which it interpreted as a complaint of possible judicial

The Telephone Calls. At around 5:30 p.m. Pacific Standard Time (PST), Ms. Cynthia Salyer, the courtroom clerk, telephoned the prosecutor to convey Chief Judge Kozinski's request that the government file any written submission on this matter by 12:00 p.m. PST tomorrow (Friday) so that Isaacs would have an opportunity to respond and the Court would be able to review the submission and schedule a hearing on the matter for either later that day or Monday. Several minutes later, Ms. Salyer called the prosecutor a second time and advised him to call her before filing a submission. Ms. Salyer also stated that any such filing should be made under seal.

Friday, June 13, 2008.

The Conference Call. On Friday morning, at approximately 9:45 a.m. PST, Ms. Salyer conducted a three-way conference call with the prosecutor and Isaacs' counsel, the purpose of which was to allow the government to update the court, via Ms. Salyer, on its intention, if any, to file a written submission on the

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misconduct) asking Chief Justice John R. Roberts, Jr., to transfer the complaint to another circuit's judicial council for review and disposition. Chief Justice Roberts granted the Judicial Council's request and transferred the complaint to the Judicial Council of the Third Circuit. Although not part of the record in this case because the matter before the Third Circuit Judicial Council took place later, the Third Circuit's Judicial Council conducted an investigation, the results of which were published on June 5, 2009. See In Re Complaint of Judicial Misconduct, 575 Fd.3d 279 (3rd Cir. 2009). The decision by the Third Circuit Judicial Council was not available when the District Court in this case acted on the dismissal motion but the Ninth Circuit had the benefit of the Third Circuit Judicial Council's decision when it heard the appeal in this case.

recusal issue. See Att. H to Govt's Opp. To Mot. To Dismiss, E.R. 106-108. During the call, the prosecutor stated the government was in fact planning to make a submission. He further indicated that the government did not perceive any justification for filing its submission under seal, as Ms. Salyer had directed the day before, but that the government would abide by a court order directing that its submission be filed under seal.

Chief Judge Kozinski's Order. At around 12:00 p.m. PST, prior to the government's filing of any submission, Chief Judge Kozinski issued the following order in Isaacs' case, which was captioned "Order Recusing":

> In light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial. I recuse myself from further participation in the case and will ask the chief judge of the district court to reassign it to another judge.
>
> S/Alex Kozinski

Dkt. 66.

That afternoon, then-Chief United States District Judge Alicemarie Stotler issued an order reassigning Isaacs' case to Judge King, Dkt. 67, E.R. 9, who, in turn, also entered an order setting the matter for a "status conference and trial setting." Dkt. 68.

Also the same afternoon the clerk notified the jurors not to return on Monday June 16 because of the

mistrial. None of the proceedings of June 13, 2008 were conducted in open court. Neither the prosecutor, the defendant, nor his attorney were present in court on June 13, 2008. The District Court expressly found that the Petitioner ". . . had no reasonable opportunity to object to the mistrial declaration after it was made and before the jurors were discharged."

Later, on July 25, 2008 Isaacs filed a motion to dismiss the Indictment on the ground that the Double Jeopardy Clause of the Fifth Amendment barred his retrial. Isaacs argued that Chief Judge Kozinski erred in recusing himself and that in any event there was no need for a mistrial because a replacement judge could have stepped in immediately either pursuant to Rule 25(a) of the Federal Rules of Criminal Procedure or pursuant to stipulation. The Government opposed the motion and the District Court entered an order denying Isaac's motion to dismiss on September 19, 2008. In his nine page written decision (Appendix B), District Court Judge George H. King, to whom the case was reassigned and who was the judge who handled the case initially, agreed to await appellate review before setting the date for retrial.

Isaacs duly appealed to the United States Court of Appeals for the Ninth Circuit. After Isaacs filed his Opening Brief with the Ninth Circuit in this case the Third Circuit's Judicial Council published its decision on June 5, 2009 regarding its investigation of Judge Kozinski. See In re Complaint of Judicial Misconduct, 575 F.3d 279 (3rd Cir. 2009). The Judicial Council did not find that Judge Kozinski's impartiality could have been reasonably questioned, which is the recusal requirement. Rather, the Judicial Council only found as follows:

> "We find that the Judge's possession of sexually explicit offensive material combined with his carelessness in failing to safeguard his sphere of privacy was judicially imprudent."

Id. at 284.

With respect to the instant case, the Judicial Council decided not to rule on Judge Kozinski's decision to recuse himself. The Judicial Council expressly referred to the instant case and noted this appeal was pending as of the date of the Judicial Council's decision. Id. at 296-297

The Ninth Circuit was notified of the decision of the Third Circuit's Judicial Council and then conducted oral argument on December 10, 2009. On December 22, 2009 the Ninth Circuit Panel issued a four page non published Memorandum affirming the order of Judge King denying the motion to dismiss (Appendix A). On February 3, 2010 the Ninth Circuit denied a timely a Petition for Rehearing and Rehearing En Banc (Appendix D).

STATEMENT OF PROCEDURAL HISTORY

On June 13, 2008 the District Court judge recused himself and declared a mistrial. On September 19, 2008 District Judge George H. King denied a motion to dismiss on double jeopardy grounds. On December 22, 2009 the Ninth Circuit Court of Appeals affirmed the order denying the motion to dismiss and on February 3, 2010 the Ninth Circuit denied a Petition for Rehearing and Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO DETERMINE WHETHER A DISTRICT COURT JUDGE MAY RECUSE HIMSELF IN THE MIDDLE OF A CRIMINAL JURY TRIAL BECAUSE OF EMBARRASSING NEWSPAPER ARTICLES

The recusal and mistrial issues presented by this Petition are interrelated but do present arguably distinct issues for this Court's consideration. It may be that in the absence of a mistrial the propriety of a District Court's recusal would not be subject to judicial review. For example, if prior to jeopardy attaching a district judge recuses himself there really is no appellate issue unless the party objecting to the recusal seeks an immediate writ of mandate from a circuit court. This case presents an excellent opportunity for this Court to decide the recusal issue presented by the Petition because it did trigger a mistrial although, as will be explained later, there was no need for the mistrial because a replacement judge could have stepped in immediately and continued on with the case. That will be discussed below under the second heading.

Title 28, United States Code, Section 455(a) provides as follows:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any

proceeding in which his impartiality might reasonably be questioned."

This provision does not on its face distinguish between civil and criminal cases and between pretrial and trial proceedings but application of the statute should consider such differences; the Government disagrees.

Petitioner Isaacs argued unsuccessfully below that the standard may be different depending upon whether the case is a criminal case or civil case and especially whether, in a criminal case, jeopardy has attached. Petitioner's argument that a district court judge during the middle of a criminal trial should exercise more restraint with respect to self recusal than perhaps a judge might exhibit in a civil case or in a criminal case prior to trial was rejected.

Petitioner unsuccessfully argued below that more is needed to justify recusal during a criminal trial than prior to jeopardy attaching. If a defendant in a criminal case has done nothing to contribute to the possible necessity for recusal and if he specifically objects to recusal and a possible mistrial, the trial court judge should be more reluctant to recuse himself if the effect of the recusal is a retrial.

Here the District Court and the Ninth Circuit examined 28 U.S.C. § 455(a) without regard to the posture of the case or the nature of the case. This alone constitutes error and this Court should express itself on this issue. After all, there is a continuum with respect to partiality and impartiality. Obviously there are cases where recusal would be warranted such as the district judge discovering in the middle of the trial

that the defendant is his long missing brother. The judge might discover that he overlooked the fact that he owns a substantial amount of stock in the corporate defendant standing trial before him. There are extremes in the other direction which would not require recusal (the defendant has season tickets next to the judge's seats at the local ball park).

In the instant case it turned out that the trial judge (Chief Judge Alex Kozinski) had some raunchy but not legally obscene photos on his own website. No one accused Judge Kozinski of being partial to the defendant. The Third Circuit's Judicial Council simply determined that Judge Kozinski had been judicially imprudent, a finding to which Petitioner vigorously objects.

The question is whether a judge's private conduct involving his own taste of text and pictures disqualifies him from handling a criminal obscenity case, where the materials were admittedly of a much different nature than what Judge Kozinski might have had on his own website. Petitioner refers this Court to the Third Circuit Judicial Council's decision, a matter in which Petitioner did not participate. Petitioner's views were never requested by the Judicial Council of the Third Circuit and apparently Judge Kozinski conceded judicial impropriety to accomplish his own goal.

The question before the District Court, the Ninth Circuit, and this Court is whether or not recusal was mandated by Section 455(a). Petitioner submits it was not. Judicial impropriety is not the same as judicial partiality.

This Court has never decided a recusal case in the context of a criminal jury trial where the recusal, over the objection of the defendant standing trial, results in a mistrial and a potential retrial. As will be set forth below, the recusal issue might be decided differently if the result of the recusal is simply to allow another judge to step in and continue on with the trial to avoid a double jeopardy issue. As stated, Petitioner has separated the two issues in case this Court wishes to deal with them in isolation.

The leading United States Supreme Court case on the issue of disqualification is Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). The case involved a civil trial conducted by Judge Robert Collins sitting without a jury. After Judge Collins rendered a judgment in the civil, non jury case, it was learned that he had a conflict of interest. The losing side moved to vacate the judgment that Judge Collins had rendered. The Court of Appeals ruled that Judge Collins should have disqualified himself when he learned of the conflict of interest. The United States Supreme Court affirmed the judgment of the Court of Appeals. Needless to say the Liljeberg v. Health Services Acquisition Corp. case did not involve a judge recusing himself in the middle of a criminal jury trial. While a judge arguably may initially decline a particular case if there is some possible but remote situation that could lead some irrational members of the public to be prejudiced against a particular judge or unreasonably feel the judge might not be completely fair the same problem would not justify recusal if it becomes known in the middle of a criminal jury trial. There are degrees of appearances of partiality or impartiality. Everything must be balanced together. And timing is of utmost importance. For example, the

more serious the problem the less important it is that the matter has proceeded a long way. If prior to trial Judge Kozinski's third cousin had been charged with a misdemeanor violation of California's obscenity law then perhaps Judge Kozinski could have disqualified himself. But not if he learns the same thing in the middle of the trial. If in the middle of a trial, a judge should be indicted for criminal conduct arguably the judge might have a basis for disqualifying himself but even in that situation consent should be obtained if the disqualification also leads to a mistrial. In United States v. Jaramillo, 745 F.2d 1245 (9th Cir. 1984) cert.den., 471 U.S. 1066 (1985) a federal judge was indicted while presiding over a criminal jury trial in the federal court. The Ninth Circuit affirmed an order denying a double jeopardy dismissal motion after the judge recused himself and declared a mistrial.

This Court considered Section 455(a) in a criminal case in Liteky v. United States, 510 U.S. 540 (1994). In this case the convicted defendants challenged on appeal the refusal of the district court judge to disqualify himself on the ground that he would not be impartial. While the narrow issue which prompted this Court to take the case was whether the recusal sought by the defendants was subject to the limitation known as the "extrajudicial source" doctrine, the case does explore grounds for recusal under Section 455(a) and although four justices of this Court concurred in the judgment but not in the opinion of Justice Scalia, even the concurring judges agreed that Section 455(a) required a "high threshold" (Kennedy concurring, 510 U.S. at 558). Justice Kennedy also stated, 510 U.S. at 562:

> "... The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office...."

As stated, Liteky v. United States was a criminal case where the defendants' attempt to have the district judge, sitting without a jury, recused was rejected by the District Court, by the Eleventh Circuit, and by this Court in an opinion authored by Justice Scalia.

Instructive on the issue of disqualification is then Associate Justice Rehnquist's decision to deny a motion to disqualify him in Laird v. Tatum, 409 U.S. 824 (1972). In his decision Justice Rehnquist recognized that judges are not fungible. Justice Rehnquist quoted with approval Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v. Judicial Council, 398 U.S. 74, 137 (1970):

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for proffered defense, and the like. . . ."

Also instructive is Justice Rehnquist's acknowledgment in Laird v. Tatum, supra, that in deciding a recusal motion a judge should consider the effect of granting the recusal request. With respect to a Supreme Court recusal request directed to a particular Justice the effect of granting such a request might mean that the Court cannot decide the case and might split four to four. If consideration of the result of recusal is proper (e.g., affirmance by an equally

divided Supreme Court, which is not favored), the consequence of recusal by a district judge during the middle of a criminal trial should also be considered in determining whether or not recusal is warranted. As stated, the government below argued there was no sliding scale of recusal and that if recusal is warranted in one case it is warranted in another case, no matter at what stage of the proceedings (pretrial versus during trial). Petitioner disagrees and submits that in some cases, which can go one way or the other, if the effect of the recusal is to impinge upon the right be free of double jeopardy, then the District Court should give the defendant more slack if the defendant is objecting to the recusal by the Court. Indeed, in such a circumstance it would help for the prosecution to join in the defendant's request that the district judge not recuse himself.

Chief Judge Kozinski should have followed the lead of Supreme Court Justice Scalia, who denied a motion to recuse him in Cheney v. U.S. District Court, 541 U.S. 913 (2004). Justice Scalia said recusal was not warranted despite his reception of ". . . a good deal of embarrassing criticism and adverse publicity . . . ." Id. at 929. Scalia refused to succumb to negative stories in the Los Angeles Times. Justice Scalia rejected the assertion that his impartiality could be reasonably questioned because the largest newspapers in the United States questioned his impartiality.

Judges are human beings. They are citizens of this country. Judges have privacy rights. No reasonable person could have questioned Judge Kozinski's impartiality in this case. Judge Kozinski overreacted to two L.A. Times newspaper articles. His embarrassment should not have resulted in Petitioner

having to stand trial a second time. Or course, as will be discussed below, if another judge could have stepped in immediately recusal might have been tolerable and without legal injury to any one.

II

THERE IS A SPLIT AMONG THE CIRCUIT COURTS ON THE QUESTION AS TO WHETHER A REPLACEMENT JUDGE CAN REPLACE A JUDGE WHO HAS RECUSED HIMSELF IN THE MIDDLE OF A CRIMINAL JURY TRIAL TO ALLOW THE REPLACEMENT JUDGE TO CONTINUE WITII THE TRIAL TO AVOID A MISTRIAL.

If a replacement judge could have stepped in and resumed the trial then arguably the recusal issue need not be reached. In this case, however, both the District Court and the Ninth Circuit refused to follow the Fourth Circuit's lead in United States v. Sartori, 730 F.2d 973 (4th Cir. 1984), where the Fourth Circuit held that upon the District Judge's recusal in the middle of a criminal jury trial the defendant's Fifth Amendment right not to be tried a second time was violated when the judge declared a mistrial rather than allowing a replacement judge to step in and complete the trial. The decision was based upon Federal Rules of Criminal Procedure, Rule 25(a), which allows a replacement judge to proceed with the trial even when the first judge recuses himself.

The panel below in this case felt obligated to follow a prior Ninth Circuit Panel decision in United States

v. Jaramillo, 745 F.2d 1245 (9th Cir. 1984) cert.den., 471 U.S. 1066 (1985).

The Ninth Circuit's decision in Jaramillo involved a sitting federal district court judge (Judge Harry Claiborne) who was indicted in the middle of conducting a criminal jury trial. The district judge in that case declared a mistrial and recused himself and later another judge denied a motion for dismissal.

The Ninth Circuit in the Jaramillo case stated that Judge Claiborne properly concluded that a reasonable person with knowledge of all of the facts pertaining to the nature of the indictment would question Judge Claiborne's ability to remain impartial. By no stretch of the imagination can the possession of non obscene but erotic material on a private web site be equated with the possession of legally obscene material or with a pending indictment. In the Jaramillo case Judge Claiborne became a criminal defendant while presiding over a case wherein one party was a criminal defendant. Judge Kozinski was not under indictment or even accused of possessing obscene material. Possession of obscenity is not even a crime.

With respect to the alternative of having another judge replace Judge Claiborne, the Ninth Circuit felt that the indictment of Judge Claiborne tainted all prior rulings and actions of Judge Claiborne from the inception of the trial. In other words, putting a new replacement judge in the middle of the trial would not have solved the particular and unique problem of having had an indicted judge preside over the case. Under the theory and reasoning of the Ninth Circuit in Jaramillo case, Judge Claiborne would not have been able to sit on any future trials so long as he was under

indictment. Thus, this case is unique because nobody has suggested that Judge Kozinski should not function as a judge based upon his web site. Of course, the interesting question arises as to whether the Government would argue in a future case that Judge Kozinski should never sit in any obscenity appellate case. The Government has not made that argument but it might.. If the Government were correct in making such an assertion then judges who do not have erotic materials in their possession should not sit in obscenity cases because they would be unfair to the defense. No defendant in an obscenity case would ever want a judge who deliberately steers clear of erotic material to preside over an obscenity case. Such a judge is obviously hostile to any type of erotic material. Such a judge would be partial to the prosecution. If the Government is right rial judges in obscenity cases should have to disclose their personal preferences are with respect to erotic material. Any competent defense attorney about to start an obscenity case, based upon what has happened in this case, would want to know about the judge's private possession of erotic material. The defense would want to know if the judge subscribes to Playboy magazine or goes to x-rated theaters or deliberately avoids them. The defense would want to know the judge's reading habits. Indeed, the prosecutor would also want to know. In this particular case if there should be a retrial the Department of Justice will want to know the reading habits of the district judge who will decide this case.

The Ninth Circuit's decision in United States v. Jaramillo as well as the decision of the Ninth Circuit below in the instant case, conflict with the Fourth Circuit's decision in United States v. Sartori, 730 F.2d 973 (4th Cir. 1984), which held that where a district

judge recuses himself in a criminal case after commencement of the jury trial a substitute judge may step in pursuant to Federal Rule of Criminal Procedure 25(a) to complete the trial.

Certiorari should be granted to resolve the conflict between the Fourth Circuit on the one hand, United States v. Sartori, supra, and the Ninth Circuit on the other hand, United States v. Jaramillo, supra, and the instant case.

Rule 25(a) of the Federal Rules of Criminal Procedure should be construed, as the Court did in Sartori, to allow a replacement judge to step in in the middle of the trial to complete a trial in order to avoid the adverse consequences to the defendant, who otherwise would have to stand trial a second time.

This was an especially strong case for allowing the replacement judge to come in to finish the trial under Rule 25(a) because Judge King had already presided over pretrial proceedings in the case and was available. Moreover, the facts in the case had already been stipulated to and only two witnesses had testified for the Government, which testimony took less than one morning. It would have been extremely easy for Judge King to step in to continue on with the trial. If Rule 25(a) applies to disabilities such as recusals then the rule clearly would have applied to this case. The only thing preventing Judge King from resuming his status as the judge for the case was the Jaramillo decision, which is contrary to Sartori. The Government conceded in its Brief filed with the Ninth Circuit that Sartori (Fourth Circuit) and Jaramillo (Ninth Circuit) were in conflict.

This Court has never decided the issue presented by this case involving the double jeopardy clause. Specifically, this Court has never upheld the granting of a mistrial and the conducting of a second trial over a defendant's objection when the defendant or his attorney did not contribute in any way to the need for the mistrial and when the trial could have continued (e.g., no hung jury and no procedural defects in indictment).

In United States v. Perez, 9 Wheat. 579, 580 (1824) the Supreme Court held that the question under the Double Jeopardy Clause whether there can be new trial after a mistrial has been declared without the defendant's request or consent depends upon whether "there is a manifest necessity for the [mistrial], where the ends of public justice would otherwise be defeated." In Perez the trial judge had on his own motion declared a mistrial because of the jury's inability to reach a verdict. The Court held that the jury's inability to reach a verdict constituted "manifest necessity" authorizing the mistrial and the Double Jeopardy Clause did not bar the defendant's retrial. See also, Sattazahn v. Pennsylvania, 537 U.S. 101(2003); Richardson v. United States, 468 U.S. 317 (1984).

In Arizona v. Washington, 434 U.S. 497 (1978) a trial judge granted the prosecutor's motion for a mistrial based on the improper and prejudicial comments made during defense counsel's opening statement that evidence had been hidden from the defendant during the first trial. The Court held that retrial of the defendant was not barred by the Double Jeopardy Clause because there was manifest necessity for the mistrial. The Court noted that "defense counsel's comment was improper and may have

affected the impartiality of the jury." Id. At 511. The Court noted that "Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." Id. At 513.

In Illinois v. Somerville, 410 U.S. 458 (1973) the trial judge declared a mistrial over the defendant's objection after the jury had been sworn based upon a defect in the indictment which could not be cured by amendment and which on appeal could be asserted to overturn any judgment of conviction. The Supreme Court found there was manifest necessity for the mistrial and the Double Jeopardy Clause did not bar reprosecution of the defendant. The Court stated: "If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." Id. At 457.

In Gori v. United States, 367 U.S. 364 (1961) the mistrial was declared by the District Judge out of concern for the protection of the rights of the defendant. Here the Court did not declare the mistrial to protect the Petitioner.

A later case, United States v. Jorn, 400 U.S. 470 (1971) undermines the Gori decision. Here the United States Supreme Court held that the District Court abused its discretion in discharging the jury after declaring a mistrial on the District Court's own motion. The Supreme Court ruled that the retrial would violate the Double Jeopardy Clause. The Supreme Court in the Jorn case distinguished the Gori

case by pointing out that in Gori the District Court was motivated by a desire to benefit the defendant. However, in the Jorn case the District Court apparently was motivated by a desire to protect witnesses. The Supreme Court concluded in Jorn the mistrial was not declared to benefit the defendant. The Supreme Court in Jorn stated, 400 U.S. at 486:

> ". . . Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.
>
> Applying these consideration to the record in this case, we must conclude that the trial judge here abused his discretion in discharging the jury..."

The Supreme Court concluded its opinion by stating the following:

> "When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that thetrial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial.
>
> Therefore, we must conclude that in the circumstances of this case, appellee's re-prosecution would violate the Double Jeopardy provision of the Fifth Amendment."

The Government cited United States v. Dinitz, 424 U.S. 600 (1976) but the case is not on point. After the district judge removed one of the defendant's attorneys for misconduct during opening statement, a second attorney for the defendant in open court and with the defendant present moved for a mistrial which the attorney said would be in the best interest of his client. The Government did not oppose the mistrial motion made by the defense in open court. Needless to say the United States Supreme Court ruled that the retrial would not violate the double jeopardy clause. Obviously we have no motion by the defense in this case for a mistrial. The case is simply not on point.

In conclusion, this Court may wish to separate the two issues (recusal and mistrial) or rule on them collectively since they are intertwined. Will a retrial of the Petitioner result in a deprivation of his right to be free from double jeopardy. This case presents this Court with opportunity to deal with these important issues and to resolve the conflict between the Ninth and the Fourth Circuits.

CONCLUSION

For the reasons set forth above Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A:	Ninth Circuit Memorandum (Dec. 22, 2009)	1a
Appendix B:	District Court Order Denying Defendant's Motion to Dismiss Indictment with Prejudice (Sept. 19, 2008)	5a
Appendix C:	District Court Order Recusing (June 13, 2008)	17a
Appendix D:	Ninth Circuit Order re rehearing and rehearing en banc (Feb. 3, 2010)	19a

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-50423

D.C. No. 2:07-cr-00732-GHK-1

[Filed December 22, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
IRA ISAACS, DBA Stolen Car Films, DBA LA Media,	)
	)
Defendant -Appellant.	)
	)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

George H. King, District Judge, Presiding

Argued and Submitted December 10, 2009
Pasadena, California

Before: PREGERSON, NOONAN and PAEZ, Circuit Judges.

Ira Isaacs ("Isaacs") appeals the district court's denial of his motion to dismiss on double jeopardy grounds. Under 28 U.S.C. § 1291, we have jurisdiction to hear an interlocutory appeal from a denial of a motion to dismiss on double jeopardy grounds. Abney v. United States, 431 U.S. 651, 659 (1977). We review *de novo* a denial of a motion to dismiss on double jeopardy grounds. See United States v. Price, 314 F.3d 417, 420 (9th Cir. 2002). We recite the facts only as needed to explain our decision.

I. Recusal

Judge King did not err in ruling that Judge Kozinski properly recused himself from Isaacs's case under 28 U.S.C. § 455(a). In analyzing § 455(a) recusals, we ask "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Clemens v. U.S. Dist. Court, 428 F.3d 1175, 1178 (9th Cir. 2005) (per curiam) (internal quotation marks omitted). We find that a well-informed observer may reasonably have questioned Judge Kozinski's ability to act as an impartial judge in Isaacs's trial. Thus, we affirm Judge King's determination that the recusal was proper under § 455(a).

II. Mistrial

We review the district court's declaration of a mistrial with substantial deference. See United States v. Bates, 917 F.2d 388, 394 (9th Cir. 1990). "[A] determination of manifest necessity is an exercise of discretion, reviewed for abuse, not a finding of fact." United States v. Bonas, 344 F.3d 945, 948 n.3 (9th Cir. 2003).

This case is controlled by United States v. Jaramillo,[1] where we found no error in the district court's finding of manifest necessity for a mistrial where a judge recused himself after being criminally indicted in the midst of a trial. 745 F.2d 1245 (9th Cir. 1984). Isaacs's attempt to distinguish Jaramillo is unsuccessful because the crux of the case was that "the designation of another judge [in Jaramillo] would not remove the appearance of partiality concerning all prior rulings and all actions of the indicted judicial officer." Id. at 1249. In this case, the designation of another judge half way through the proceedings would not have removed the appearance of partiality concerning Judge Kozinski's previous actions in the case. As the court in Jaramillo held, Federal Rule of Criminal Procedure 25(a) applies to the replacement of a judge disabled because of death or sickness, not recusal for other reasons. Id. Because Jaramillo is controlling Ninth Circuit precedent, Judge King

---

[1] Bates suggests indicators to examine in determining whether a judge has exercised sound discretion in declaring a mistrial. 917 F.2d at 396. The Jaramillo case, however, is controlling because both Isaacs's case and Jaramillo involve a mistrial declared following a judge's recusal because of the judge's own personal situation.

correctly found that Judge Kozinski did not err in failing to consider alternatives to mistrial. As in Jaramillo, the "extraordinary circumstances of this case required that a mistrial be declared." Id. at 1248.

III. Judicial Notice of the Los Angeles Times articles

Judge King did not err when he took judicial notice of the Times articles because the articles were not hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Fed. R. Evid. 801(c). The out of court statements contained in the Times articles were not offered for the truth of the matter asserted. Judge King's determination of whether Judge Kozinski's recusal was proper under § 455(a) required Judge King to assess whether a reasonable person with knowledge of all of the facts would question Judge Kozinski's impartiality. Because Judge King's judicial notice accepted only the existence of the Times articles, the articles were not hearsay.

IV. Conclusion

Judge King did not err in finding Judge Kozinski's recusal was proper, in finding that Judge Kozinski exercised sound discretion in declaring a mistrial, or in considering the Times articles. For the foregoing reasons, the district judge's order denying Isaacs's motion to dismiss on double jeopardy grounds is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA

CASE NO. CR 07-732-GHK

[Filed September 19, 2008]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
IRA ISAACS,	)
	)
Defendant.	)
	)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT WITH PREJUDICE

This matter is before us on Defendant's Motion for an Order Dismissing the Indictment with Prejudice ("Motion"). On June 13, 2008, Chief Judge Alex Kozinski declared a mistrial in this case. Defendant now moves to dismiss the indictment against him. He argues that his re-prosecution is barred by the Double Jeopardy Clause. U.S. Const. amend. V. Because the parties are familiar with the facts in this case, we will

not repeat any facts except as necessary. We have fully considered the parties' briefing as well as counsel's oral argument on September 8, 2008. We rule as follows:

When, as here, a mistrial is declared after jeopardy attaches[1] but before the jury reaches a verdict, a defendant may be tried again for the same crime only if he consents to the mistrial or if the district court determines that the mistrial was required by manifest necessity. *See United States v. Chapman*, 524 F.3d 1073, 1081 (9th Cir. 2008); *United States v. Bates*, 917 F.2d 388, 392 (9th Cir. 1990).

I. Express or Implied Consent

The Government argues that Defendant cannot bring this Motion because he consented to a mistrial. Consent to a mistrial can either be express or implied. Express consent to mistrial "is deemed to be a deliberate election on [defendant's] part to forego his valued right to have his guilt or innocence determined before the first trier of fact[,]" and usually removes any double jeopardy bar to re-prosecution. *United States v. Nelson*, 718 F.2d 315, 320 (9th Cir. 1983). In this case, there is no evidence that Defendant expressly consented to a mistrial. To the contrary, in open court and on the record Mr. Diamond, counsel for Defendant, stated that he opposed a mistrial based on the June

---

[1] Neither side disputes that jeopardy had attached at the time Judge Kozinski declared the mistrial. We agree. Jeopardy attaches in a jury trial after a jury has been empaneled and sworn. *Serfass v. United States*, 420 U.S. 377, 388 (1975). Here, it is undisputed that the jury had been empaneled and sworn before Judge Kozinski declared the mistrial.

11, 2008, *Los Angeles Times* ("*Times*") article.[2] (Trial Tr. pg. 87, ln. 20-21, Jun. 11, 2008).

Similarly, there is no evidence that Defendant impliedly consented to a mistrial. Implied consent, like express consent, "removes any double jeopardy bar to retrial." *United States v. Smith*, 621 F.2d 350, 351 (9th Cir. 1980). Nevertheless, we may infer implied consent "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." *Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995); *United States v. You*, 382 F.3d 958, 964–65 (9th Cir. 2004). The Government argues that Defendant impliedly consented to the mistrial order by failing to object to it immediately after it was issued. We agree with Mr. Diamond that he had no reasonable opportunity to object to the mistrial declaration after it was made and before the jurors were discharged. His failure to object did not in any way amount to a "willingness to acquiesce in the mistrial order." Thus, we find and conclude that Plaintiff neither expressly nor impliedly consented to mistrial.

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[2] As we stated on the record at oral argument on this Motion, we will not consider the alleged telephone conversation between Mr. Diamond, Mr. Whitted, counsel for the Government, and Judge Kozinski's courtroom deputy clerk. The conversation was not on the record, its accuracy is disputed, and Judge Kozinski was not present during the conversation. Furthermore, even if we were to consider the alleged telephone conversation, we would not find that Defendant had consented to a mistrial. At best, Mr. Whitted claimed Mr. Diamond consented to a mistrial provided that Defendant would not be re-tried until 2009. As the Government admits in its own declaration, Defendant's contingency was rejected by the Government. Accordingly, we find and conclude that Defendant had not expressly consented to a mistrial.

II. Manifest Necessity

Because jeopardy attached before the mistrial declaration, absent consent, as here, re-trial is constitutionally permissible only if there was manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated. *Illinois v. Somerville*, 410 U.S. 458, 461 (1973); *see also United States v. Elliot*, 463 F.3d 858, 864 (9th Cir. 2006). In determining whether a judge was correct in finding "manifest necessity," we consider the grounds for the mistrial declaration, as well as whether the judge acted within his "sound discretion" in concluding that manifest necessity for a mistrial existed. *See Elliot*, 463 F.3d at 864. Here, Judge Kozinski recused himself, and then declared a mistrial. In his order, Judge Kozinski stated that "[i]n light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial. I recuse myself from further participation in the case . . . ."

A. Judge Kozinski's Self-Recusal

Under 28 U.S.C. § 455(a) a judge must recuse himself if "a reasonable person *with knowledge of all the facts* would conclude that the judge's impartiality might reasonably be questioned." *Pesnell v. Arsenault*, ___ F.3d ___, 2008 WL 4192067, at *4 (9th Cir. Sept. 15, 2008) (emphasis added); *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008). In determining the propriety of Judge Kozinski's recusal determination under § 455(a), we consider the entirety of the record because "[d]isqualification under § 455(a) is necessarily fact-driven and may turn on subtleties in the particular case. Consequently, the analysis of a

particular § 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *Holland*, 519 F.3d at 913 (citation omitted). The record in this case includes the *Times* articles,[3] the statements attributed to him in those articles,[4] the court's two colloquies with the

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[3] As of the mistrial declaration, there were two articles at issue. One was published on the *Times* website on June 11, 2008, and the other was published in the June 12, 2008, paper edition. On the record in proceedings on June 11, 2008, Judge Kozinski referred to the website article that had appeared earlier that day. Because Judge Kozinski recused himself on June 13, 2008, after the publication of the print version of the June 12, 2008 *Times* article, and because he referred to the "public controversy" in his recusal order, we conclude that these two articles encompassed the subject matter of the "public controversy" to which Judge Kozinski referred in his recusal order.

[4] Defendant objects to our consideration of these two articles, largely on hearsay grounds, but also because the articles were not actually spread on the record in this case. To the extent that Defendant argues that the articles are not in the record before us, we reject this argument. We can, and do, take judicial notice of the *Times* articles. Fed. R. Evid. 201 (stating rule for taking judicial notice); *United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007) (observing that courts have the right to take judicial notice of the existence and content of published articles). Insofar as Defendant objects on hearsay grounds, this objection is also overruled. We are not convinced that, in determining the propriety of recusal, we are necessarily prohibited from considering hearsay statements in all instances. *See United States v. Professional Air Traffic Controllers Organization*, 527 F. Supp. 1344, 1356 n.12 (N.D. Ill. 1981) (noting that hearsay might, in some circumstances, constitute a basis for recusal); *Hodgson v. Liquor Salesmen's Local Union No. 2*, 444 F.2d 1344, 1349 (2d Cir. 1971) (concluding that the fact a recusal application is based

parties concerning the first *Times* article, and Judge Kozinski's June 12, 2008, order requesting that proceedings be initiated against him pursuant to Rule 26 of the Rules Governing Judicial Conduct and Disability ("Conduct Rule 26").[5]

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entirely on hearsay may be taken into account in judging the sufficiency of an affidavit required for recusal under 28 U.S.C. § 144, but not holding that hearsay may not in some circumstances constitute a basis for recusal); *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 67 (S.D.N.Y. 2001) (recognizing that hearsay statements could be considered in a recusal motion).

We recognize that recusal cannot be necessitated by the simple publication of a wholly fabricated article about a judge, lest judicial administration be hijacked by such manipulation. *See In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (misrepresentations or falsehoods made by third parties, even if widely reported and might theoretically cause "appearance of partiality" not bases for recusal). But we also should not ignore the contents of the articles especially in light of the context they provide for the proceedings that followed their publication.

In this case, we need not, and do not, determine that every assertion in the articles is true. Nevertheless, we conclude that a reasonable person may and would consider the assertions in the articles in light of all of the circumstances reflected in this record. These circumstances include (1) the absence of any evidence that the subject matter and content of the articles, including statements attributed to Judge Kozinski, are wholly fictitious, (2) Judge Kozinski's reaction to such articles which, while not directly commenting on the merits, also does not assert that the articles are without any factual basis such that the publication is properly viewed as an attempt to manipulate the judicial process, and (3) the judge's characterization of the matter as serious enough to merit not only the parties' consideration of a recusal motion, but also an investigation under Rule 26 of the Rules Governing Judicial Conduct and Disability.

[5] Judge Kozinski requested "the Judicial Council of the Ninth Circuit to take steps pursuant to Rule 26, of the Rules Governing

The purpose of § 455(a) is to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988); *Holland*, 519 F.3d at 913 n.3. With that in mind, the question before us is not whether Judge Kozinski had any actual bias, either for or against Defendant or the Government, but whether a reasonable person with knowledge of all the facts would conclude that his impartiality might reasonably be questioned. *United States v. Jaramillo*, 745 F.2d 1245, 1248 (9th Cir. 1984). Based on the subject matter of, and the statements attributed to Judge Kozinski in, the articles, Judge Kozinski's own statements relating to the articles made on the record, as well as his request for proceedings under Conduct Rule 26, a reasonable person, aware of all the facts and giving due regard to the nature and quality of those facts, would conclude that his impartiality might reasonably be questioned in this case. Therefore, based upon the entire record, taken in context and in its entirety, we find and conclude that Judge Kozinski's recusal was required by 28 U.S.C. §455(a).[6]

Judicial Conduct and Disability, and to initiate proceedings concerning the article that appeared in [the June 11, 2008 online edition of the] Los Angeles Times." He said that he "will cooperate fully in any investigation." Gov. Attach. D.

[6] We reject Defendant's attempt to focus solely on the reported subject matter of some of the content on Judge Kozinski's server, as well as the parade of horribles Defendant argues would occur were we to determine that Judge Kozinski's recusal was required based solely or largely thereon. Here, we do not rely on any one fact, but on the totality of the circumstances, in determining whether recusal was required.

B. Manifest Necessity For A Mistrial

A judicial determination of manifest necessity is reviewed for abuse of discretion. *Chapman,* 524 F.3d at 1082.[7] In this case, Judge Kozinski's recusal, which we find proper, is a significant factor in our determination of whether he exercised sound discretion in concluding that manifest necessity for mistrial existed. In *Jaramillo*, the Ninth Circuit concluded that manifest necessity for mistrial was shown when the trial judge recused himself mid-trial due to his indictment. 745 F.2d at 1248. We, of course, do not rely solely on the recusal order. We have also considered the other factors set forth in *Bates*. 917 F.2d at 395–96. These factors are whether the judge heard the parties' opinions about the propriety of mistrial, whether he considered any alternatives to mistrial and chose the least harmful alternative to a defendant's rights, whether he acted deliberately instead of abruptly, and whether the mistrial benefitted defendant. *Id.*

First, Judge Kozinski heard Mr. Diamond's position that he opposed any mistrial.

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[7] Although the level of deference varies according to the circumstances of the case, review with the "strictest scrutiny" is only proper when the prosecution sought mistrial for a tactical advantage. *Arizona v. Washington*, 434 U.S. 497, 508 (1978); *Chapman*, 524 F.3d at 1082. Here, Defendant does not directly assert that the Government sought mistrial for a tactical advantage. *But see infra. at n.9.* To the extent Defendant makes this assertion, we reject it. The record does not support any inference that the Government brought on this dispute, much less that it did so to gain a tactical advantage over the Defendant.

Second, although the record does not show affirmatively that Judge Kozinski considered alternatives to mistrial, we conclude that none was available under the circumstances of this case. Defendant argues that another judge could have completed the jury trial pursuant to Fed. R. Crim. P. 25(a).[8] We disagree. First, although disability brought on by death or sickness is within the scope of the Rule, a "disability" arising from recusal would not likely serve the purpose of the Rule. In *Jaramillo*, the Ninth Circuit recognized this distinction in observing that "[n]either death nor a disabling sickness necessarily affects the integrity of all prior proceedings in the trial." 745 F.2d at 1249. However, a "disability" brought on by recusal "directly implicates the character and integrity of the judge especially in relation to criminal proceedings, [and] the designation of another judge would not remove the appearance of partiality concerning all prior rulings and all actions of the [recused] judicial officer, from the inception of the trial." *Id.* Similarly, that Judge Kozinski had to recuse himself because a reasonable person would conclude that his impartiality might reasonably be questioned calls into question all of his prior rulings in this case. To establish the appearance of justice under such circumstances, a new judge would necessarily be compelled to begin the trial anew. *See Id.* While clearly there is a difference between the facts necessitating recusal in *Jaramillo* and in this case, at bottom what is important is not a comparison of the relative need

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[8] Fed. R. Crim. P. 25 provides that: "(a) **During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and (2) the judge completing the trial certifies familiarity with the trial record."

for recusal but that once recusal is required, public confidence is necessarily undermined as to all of the recused judge's prior rulings. Thus, contrary to Defendant's arguments, Judge Kozinski was not under a "disability" within the meaning of Fed. R. Crim. P. 25(a), and the appointment of another judge to complete the trial was not a viable alternative to mistrial.

Third, the record shows that Judge Kozinski also acted with due deliberation when he declared the mistrial. The first *Times* article was released on Wednesday, June 11, 2008. The mistrial was not declared until Friday, June 13, 2008. In the interim, Judge Kozinski called the June 11, 2008 *Times* article to the parties' attention and gave them adequate time to be heard and to consider their options. Under these circumstances, the mistrial declaration was not an abrupt reaction to emerging events, but was the result of calm deliberation. *See e.g.*, *Cherry v. Director, State Bd. of Corrs.*, 635 F.2d 414, 418 (5th Cir. 1981) (en banc) (upholding a mistrial declaration made "after inquiry and overnight deliberation").[9]

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[9] During oral argument on this Motion, Mr. Diamond speculated that Judge Kozinski was intimidated into making a hasty mistrial declaration by a purported "threat" by Government counsel to file a recusal motion in the public record. To support this dubious proposition, counsel resorted to the Declaration of Mr. Whitted which he had previously sought to exclude as being outside the record. While we disfavor counsel's attempt to have his cake and eat it too, we reject this argument in any event. Even were we to consider Mr. Whitted's declaration for this limited purpose, we do not view the Government's position that a potential recusal motion should not be filed under seal absent court order as remotely constituting a threat to the judge, especially when significant proceedings on the subject had already occurred on the

Finally, although we are not certain whether the mistrial benefitted Defendant, this factor does not outweigh the other factors that militate strongly in favor of mistrial. *See Chapman*, 524 F.3d at 1082 n.3 (because the first three *Bates* factors demonstrated that the district court did not abuse its discretion, panel elected to bypass the fourth factor in that case). In any event, Defendant has not cited any authority, and we are aware of none, to suggest that mistrial is only proper if this fourth factor is satisfied. Therefore, under *Bates,* and given our determination that Judge Kozinski's recusal was proper, we conclude that Judge Kozinski acted with sound discretion in finding manifest necessity for a mistrial.

III. Conclusion

Judge Kozinski's self-recusal was proper under § 455(a). There was no abuse of discretion in his conclusion that there was manifest necessity for the declaration of a mistrial. Accordingly, the United States is not barred from re-trying the Defendant. In

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open record. Moreover, we find there is absolutely no evidence that the judge reacted in haste due to this alleged threat or for any other reason. Defendant also points to Judge Kozinksi's recusal and mistrial order as purported evidence of the haste under which he acted. Mr. Diamond asserted that Judge Kozinski was in such a hurry (purportedly to forestall a threatened public recusal motion) that he only designated the order as "Order Recusing" instead of a more complete designation of the order as also one declaring a mistrial. This speculation at best elevates form over substance. The body of the order addressed not only recusal but also found manifest necessity for a mistrial. As a matter of fact, we find from this record that there is no credible evidence of either a threat to the judge or any hasty mistrial declaration by the judge in response to that alleged threat.

light of these findings and conclusions, Defendant's motion to dismiss the indictment is **DENIED**.

We recognize that an order denying a motion to bar re-trial on double jeopardy grounds is subject to immediate appeal. *See U.S. v. Chick*, 61 F.3d 682, 684–85 (9th Cir. 1995); *Abney v. U.S.*, 431 U.S. 651, 659–62 (1977). As such, we do not set this matter for re-trial at this time. The Government and Defendant shall file a joint status report stating that either (1) a timely notice of appeal was filed, or (2) Defendant failed to do so. If a timely notice of appeal is filed, we shall await the results of appellate review. If no timely notice of appeal is filed, we shall set this matter for re-trial.

IT IS SO ORDERED.

DATED: September 19, 2008.

/s/
GEORGE H. KING
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF' CALIFORNIA

No. CR 07-732 AK

[Filed June 13, 2008]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
IRA ISAACS,	)
	)
Defendant.	)
	)

ORDER RECUSING

In light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial. I recuse myself from further participation in the case and will ask the chief judge of the district court to reassign it to another judge.

/s/
Alex Kozinski*

* The Honorable Alex Kozinski, United States Chief Judge for the Ninth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(b).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-50423

D.C. No. 2:07-cr-00732-GHK-1
Central District of California,
Los Angeles

[Filed February 3, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
IRA ISAACS, DBA Stolen Car Films, DBA LA Media,	)
	)
Defendant - Appellant.	)
	)

ORDER

Before: PREGERSON, NOONAN and PAEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for

rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

No. 09-1365

In the Supreme Court of the United States

IRA ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge properly recused himself in the midst of petitioner's trial to preserve the appearance of impartiality under 28 U.S.C. 455(a), based on the release during trial of news reports about the judge, whose accuracy the judge did not dispute, and which led the judge to request a Judicial Council investigation into his reported conduct.

2. Whether the district court exercised sound discretion in determining that manifest necessity justified a mistrial under those circumstances.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 14
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 12
Arizona v. *Washington*, 434 U.S. 497 (1978) 17, 18
Cheney v. *United States Dist. Court*, 541 U.S. 913 (2004) 16
Clemens v. *United States Dist. Court*, 428 F.3d 1175 (9th Cir. 2005) 13
Complaint of Judicial Misconduct, In re:
575 F.3d 279 (3d Cir. Jud. Council 2009) 4, 10
No. 08-90035 (9th Cir. Jud. Council June 16, 2009), http://www.ce9.uscourts.gov/misconduct/orders/08_90035.pdf 10
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 17
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949) 17
Illinois v. *Somerville*, 410 U.S. 458 (1973) 17
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) 16
Liteky v. *United States*, 510 U.S. 540 (1994) 15
Offutt v. *United States*, 348 U.S. 11 (1954) 15
Oregon v. *Kennedy*, 456 U.S. 667 (1982) 18

Cases—Continued: Page

Renico v. *Lett*, No. 09-338 (May 3, 2010) 18
Sao Paulo State of the Federative Republic of Braz. v. *American Tobacco, Inc.*, 535 U.S. 229 (2002) 16
Serfass v. *United States*, 420 U.S. 377 (1975) 6
United States v. *Allen*, 984 F.2d 940 (8th Cir. 1993) 18
United States v. *Bates*, 917 F.2d 388 (9th Cir. 1990) .. 13, 18
United States v. *Berroa*, 374 F.3d 1053 (11th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) 18
United States v. *Cameron*, 953 F.2d 240 (6th Cir. 1992) 18
United States v. *Elliot*, 463 F.3d 858 (9th Cir.), cert. denied, 549 U.S. 1021 (2006) 19
United States v. *Jaramillo*, 745 F.2d 1245 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985) 12, 14, 19, 20, 21
United States v. *Johnston*, 268 U.S. 220 (1925) 17
United States v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824) ... 17
United States v. *Sartori*, 730 F.2d 973 (4th Cir. 1984) 19, 20, 21
Wade v. *Hunter*, 336 U.S. 684 (1949) 18

Constitution, statutes and rules:

U.S. Const. Amend. V (Double Jeopardy Clause) 11, 20
Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 14
18 U.S.C. 1462(a) 3
18 U.S.C. 1465 3
18 U.S.C. 1467 3
18 U.S.C. 2257(f)(4) 3
28 U.S.C. 291(a) 12

Statutes and rules—Continued: Page

28 U.S.C. 291(b) 4
28 U.S.C. 455 (1970) 14
28 U.S.C. 455 16
28 U.S.C. 455(a) ..... *passim*
28 U.S.C. 455(e) 21
Fed. R. Crim. P.:
Rule 25(a) 13, 17, 19, 20, 21, 22
Rule 25(a)(1)-(2) 19
Rule 26.3 18
R. for Judicial-Conduct & Judicial-Disability Proceedings 26 9

Miscellaneous:

Scott Glover:
Judge in Obscenity Case Put Explicit Photos on Web, L.A. Times, June 11, 2008 5
Judge Maintained Web Site with Explicit Photos, L.A. Times, June 12, 2008 9
H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) 14, 15
S. Rep. No. 419, 93d Cong., 1st Sess. (1973) 14, 15
Statement by Alex Kozinski, Chief Judge, 9th Cir., June 12, 2008, http://www.ce9.uscourts.gov/misconduct/orders/CJA_6-12-08.pdf 9

In the Supreme Court of the United States

No. 09-1365

IRA ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2009 WL 5125761. The order of the district court (Pet. App. 5a-16a) is not published in the Federal Supplement but is available at 2008 WL 4346780.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2009. A petition for rehearing was denied on February 3, 2010 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on May 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

During petitioner's jury trial on federal obscenity charges, two news articles appeared that raised questions about the trial judge's personal conduct. Pet. App. 9a & n.3. "In light of the public controversy surrounding [his] involvement in the case," the trial judge declared a mistrial, based on his finding of manifest necessity, and he recused himself, based on his determination that he could no longer preside consistent with 28 U.S.C. 455(a). Pet. App. 17a. After the case was reassigned to a new judge, petitioner moved to dismiss the indictment on double jeopardy grounds, contending that the trial judge erred both in recusing himself and in declaring a mistrial. The district court denied petitioner's motion, *id.* at 5a-16a, and petitioner filed an interlocutory appeal. The court of appeals affirmed in an unpublished memorandum disposition. *Id.* at 1a-4a.

1. In February 2004, FBI agents investigating Internet distribution of allegedly obscene material uncovered evidence linking petitioner (operating through his Los Angeles, California-based business LA Media) to at least 20 different websites that sold movies containing graphic depictions of scenes of bondage, violence, defecation, urination, sadomasochism, bestiality, "scat" (*i.e.*, the use or ingestion of feces), and "bukakke" (*i.e.*, sex involving multiple males who ejaculate on a single female). 6/11/08 Tr. 34-40, 58-59.

In May 2004, and again in July and October of 2006, undercover FBI agents purchased several such movies from two of petitioner's websites. The movies were sent by employees of LA Media to undercover locations via United Parcel Service (UPS). Two of the movies lacked a statement identifying the location of the seller's documentation of the ages of the participants

involved in sexually explicit conduct. 6/11/08 Tr. 41-46; Gov't Exh. 24.

On January 17, 2007, agents executed a search warrant at LA Media's offices. A subsequent review of image copies of LA Media's computer hard drives revealed files indicating that petitioner "owned the business, ran it, [and] developed the movies." 6/11/08 Tr. 55. Agents also recovered master copies of three movies—entitled *Gang Bang Horse Pony Sex Show*, *Mako's First Time Scat*, and *Hollywood Scat Amateurs Number 7*—that the agents had purchased in the undercover buys. *Id.* at 55-56. During a consensual, noncustodial interview, petitioner admitted that he was the sole proprietor of LA Media and that he knew that the material he distributed ranged from voyeur movies "all the way to bestiality and scat movies." *Id.* at 58. He also acknowledged that most of his movies were purchased via the Internet, and that he would ship the movies to purchasers via UPS. *Id.* at 58-59.

2. On July 24, 2007, a grand jury in the Central District of California returned an indictment charging petitioner with four counts of selling or distributing obscene material in or affecting interstate commerce, in violation of 18 U.S.C. 1465 (Counts 1-4); two counts of transporting obscene material in interstate commerce, in violation of 18 U.S.C. 1462(a) (Counts 5 and 6); and two counts of offering for sale in interstate commerce a visual depiction of actual sexually explicit conduct without an affixed statement describing where the required age documentation records for all performers could be located, in violation of 18 U.S.C. 2257(f)(4) (Counts 7 and 8). Pet. C.A. E.R. 1-4. The indictment also included a forfeiture count pursuant to 18 U.S.C. 1467. Pet. C.A. E.R. 5-7.

The case was randomly assigned through the Central District of California's case assignment system to United States District Judge George H. King, who presided over the case for six months after arraignment. During those proceedings, the government voluntarily dismissed Counts 7 and 8. Dkt. 44.

On March 10, 2008, Judge King transferred the case from his calendar to the calendar of the Honorable Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit. Dkt. 51; see 28 U.S.C. 291(b) (authorizing temporary designation of circuit judges to hold district court). Chief Judge Kozinski did not request this particular case; it was assigned to him in accordance with the district court's regular assignment procedures. See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 296 (3d Cir. Jud. Council 2009). On March 13, 2008, Chief Judge Kozinski accepted the transfer by signing the transfer order. Dkt. 51. Chief Judge Kozinski presided over some additional pretrial matters and the June 2008 trial itself.

3. In June 2008, petitioner's case went to trial on Counts 1-6.

a. Jury selection began on Monday, June 9, 2008, and continued through the afternoon of Tuesday, June 10, 2008, when the jury was empaneled and sworn. 6/10/08 Tr. 70 (empaneling jury). On Wednesday, June 11, 2008, following the court's preliminary instructions and counsels' opening statements, the government began its case in chief. That morning, an FBI agent and a former employee of LA Media testified, and the government read to the jury a factual stipulation between the parties that the movies at issue were purchased online and mailed by LA Media via UPS. 6/11/08 Tr. 33-81; Gov't Exh. 24. The Court then excused the jury until

2:30 p.m. to have lunch and travel to another courthouse where it would view the films at issue. 6/11/08 Tr. 85.

b. While the morning session of trial was ongoing, the *Los Angeles Times* released an article on its Internet website reporting that Chief Judge Kozinski had, over a period of several years, maintained "a publicly accessible website featuring sexually explicit photos and videos." Scott Glover, *Judge in Obscenity Case Put Explicit Photos on Web*, L.A. Times, June 11, 2008 (*First Article*) (reproduced at Pet. C.A. E.R. 86-87).

According to the article, the "sexually explicit content" on this website, alex.kozinski.com, included "a photo of naked women on all fours painted to look like cows" and "a video of a half-dressed man cavorting with a sexually aroused farm animal." *First Article*. The article also reported that, in an interview with a reporter that took place on the evening of Tuesday, June 10, 2008, Chief Judge Kozinski "acknowledged * * * that he had posted the materials"; "conceded" that "[s]ome of the material was inappropriate" though not legally obscene; and "defended other sexually explicit content as 'funny.'" *Ibid.* The article stated that Chief Judge Kozinski told the reporter that he agreed to remove "some material" from his website, "including the photo depicting women as cows," which, the article indicated, he now viewed as "degrading . . . and just gross." *Ibid.* The article also stated that Chief Judge Kozinski had agreed to "get rid of a step-by-step pictorial in which a woman is seen shaving her pubic hair." *Ibid.* The article reported that Chief Judge Kozinski "declined to comment" when he was asked "whether the contents of his site should force him to step aside" from petitioner's trial. *Ibid.*

c. The afternoon of Wednesday, June 11, 2008, at 2:15 p.m., Chief Judge Kozinski met with counsel, outside the jury's presence, "to take up the story in the LA Times this morning." 6/11/08 Tr. 86. While declining to "comment on the story," Chief Judge Kozinski stated that he first "found out about it yesterday [Tuesday] after court," and thus "did not know about it before the jury was sworn and jeopardy attached." *Ibid.*; see *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) (jeopardy attaches when the jury is "empaneled and sworn"). Chief Judge Kozinski stated that he consequently "want[ed] to give the parties an opportunity to think about whether they wish[ed] to move to disqualify [him]," and he asked counsel "[w]hat would be a reasonable time for you to think about it?" 6/11/08 Tr. 86.

The prosecutor responded that he and his supervisor had been conferring with others in the Department of Justice "about what position we should take if at all," and he indicated his expectation that "we will have a response tomorrow [Thursday]." 6/11/08 Tr. 87.

Petitioner's counsel volunteered that he had been contacted by an individual whom he believed was "the source of what happened," at which point Chief Judge Kozinski reiterated that he did not "really have any comments on the merits of the story," but added that he "recognize[d] that this is a situation where it is confidence in judicial qualifications and [he] viewed it very seriously." 6/11/08 Tr. 87. Petitioner's counsel interjected that "[w]e would oppose any disqualification, and if the court were to do that, we would seek appellate remedy to oppose recusal. We oppose a mistrial. We want to go forward." *Ibid.* Chief Judge Kozinski responded by stating "I am very sorry" and reiterating that he "did not know about this before the jury was

sworn. And I—I have nothing else to say, and I hope we will go forward, but I will certainly understand if the parties feel otherwise." *Ibid.*

The trial then resumed with the government's visual presentation of the first movie and some of the second movie. 6/11/08 Tr. 91-93.

d. At the end of the afternoon of Wednesday, June 11, 2008, Chief Judge Kozinski held a second colloquy with counsel, again outside the jury's presence. 6/11/08 Tr. 93-94. The prosecutor began by stating that, based on "the matters that the government is aware of at this point," the government had some concerns about a "potential conflict of interest" in Chief Judge Kozinski's continued participation in the trial, inasmuch as the material reported to have been found on alex.kozinski.com was "arguably the same or similar material to what is on trial here." 6/11/08 Tr. 94. To "get a better understanding of where we are at this posture," the prosecutor requested a continuance of the trial until Monday, June 16, 2008, which, the prosecutor explained, would give the government time to "research the issues from a double jeopardy standpoint" and thereby inform the government's position. *Ibid.*

Petitioner's counsel "oppose[d] the government's request" for a continuance, 6/11/08 Tr. 96, because the article, "has suggested no wrongdoing, no criminal acts, no improper conduct on the part of the court." *Ibid.* Calling the matter a "nonissue," petitioner's counsel expressed his "confiden[ce] [that] the court can go forward and judge this case fairly and impartially," and he saw "no need for a stay" of the trial because "the court has done nothing wrong." *Ibid.*; see *id.* at 97 ("I think it is a big hoop-tee-do over nothing.").

The government reiterated its request to continue the trial until Monday, and petitioner's counsel countered that "[t]he private legal, lawful conduct of the court is not the concern of the government." 6/11/08 Tr. 98. Chief Judge Kozinski replied that "they are entitled to make a motion to disqualify, and they are entitled to make one based on research and evidence and nobody would even think about whether it is justified or not." *Id.* at 98-99. Chief Judge Kozinski noted that his "personal preference would be to walk away," *id.* at 99, and that "[i]f I thought I could [do so] responsibly, that is what I would do, but here we are and much is at stake." *Ibid.*

After further discussion and a brief consultation with his client, petitioner's counsel announced "[w]e have no objection to what the court's preference is which apparently is to halt the proceedings today for two days. My client does not object to that. So if that is the court's preference, then we will go along with that." 6/11/08 Tr. 101-102. Petitioner himself added that "I think everybody should have time to think about things, and we shouldn't rush through this, and I don't want to rush through it." *Id.* at 102.

The Court therefore granted what it termed the "joint motion to adjourn until Monday," 6/11/08 Tr. 102-103, and excused the jury, admonishing it "not [to] listen to any media reports or anything about [the trial] and don't discuss it with your family and friends," *id.* at 105.

e. On Thursday, June 12, 2008, the print edition of the *Los Angeles Times* carried an expanded article reporting that, during an interview with one of its reporters, Chief Judge Kozinski "acknowledged" that he "maintain[ed] his own publicly accessible Web site fea-

turing sexually explicit photos and videos." Scott Glover, *Judge Maintained Web Site with Explicit Photos*, L.A. Times, June 12, 2008 (reproduced at Pet. C.A. E.R. 90-93). In addition to the previous report of (1) the "photo of naked women on all fours painted to look like cows," and (2) the "video of a half-dressed man cavorting with a sexually aroused farm animal," the expanded article reported that Chief Judge Kozinski's website carried (3) "images of masturbation, public sex and contortionist sex," (4) a "slide show striptease featuring a transsexual," (5) "a series of photos of women's crotches as seen through snug fitting clothing or underwear," and (6) pictures and videos with "themes of defecation and urination," albeit not "in a sexual context." *Ibid.* According to the article, Chief Judge Kozinski "defended some of the adult content as 'funny' but conceded that other postings were inappropriate"; at the same time, the article noted that the material in petitioner's case was "considerably more vulgar than the content posted on [Chief Judge] Kozinski's website." *Ibid.*

That afternoon, Chief Judge Kozinski issued a statement on official letterhead: "I have asked the Judicial Council of the Ninth Circuit to take steps pursuant to Rule 26 of the Rules Governing Judicial Conduct and Disability, and to initiate proceedings concerning the article that appeared in yesterday's Los Angeles Times. I will cooperate fully in any investigation." http://www.ce9.uscourts.gov/misconduct/orders/CJA_6-12-08.pdf (reproduced at Pet. C.A. E.R. 96).[1]

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[1] On June 16, 2008, the Ninth Circuit Judicial Council entered an order pursuant to Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, interpreting Chief Judge Kozinski's statement as a complaint of possible judicial misconduct and asking the Chief Justice to transfer the complaint to another circuit's judicial council for

Later that afternoon, Chief Judge Kozinski's courtroom clerk telephoned the prosecutor to convey Chief Judge Kozinski's request that the government file any written submission on the matter by noon on Friday, June 13, 2008, to afford petitioner and the court time to review the submission and, possibly, hold a hearing. A few minutes later, the courtroom clerk placed a second call directing the prosecutor to make any written submission under seal. See Pet. C.A. E.R. 106.

f. On the morning of Friday, June 13, 2008, the courtroom clerk convened a three-way conference call with the prosecutor and petitioner's counsel so that the government could update the court, via the courtroom clerk, on any plans to file a written submission. The prosecutor stated that the government was planning to make a submission and that the government did not perceive any justification for filing under seal, as the courtroom clerk had directed the day before, but that the government would abide by a court order directing such a submission. See Pet. C.A. E.R. 106-107.

Shortly before noon, and before the government filed any papers, Chief Judge Kozinski issued an order in peti-

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review and disposition. See *In re Complaint of Judicial Misconduct*, No. 08-90035 (9th Cir. Jud. Council), http://www.ce9.uscourts.gov/misconduct/orders/08_90035.pdf (reproduced at Pet. C.A. E.R. 98-99). The same day, the Chief Justice granted the Judicial Council's request and transferred the complaint to the Judicial Council of the Third Circuit. See *id.* at 101. In a Memorandum Opinion dated June 5, 2009 and made public by separate order dated July 2, 2009, the Judicial Council of the Third Circuit concluded its proceedings. As relevant here, that body dismissed, as a merits-based matter beyond its authority to decide, the complaint to the extent it involved the propriety of the judge's decision to recuse himself from further participation in petitioner's case. See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 296-297 & n.13 (3d Cir. Jud. Council 2009).

tioner's case, captioned "Order Recusing." Pet. App. 17a-18a. That order stated: "In light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial. I recuse myself from further participation in the case and will ask the chief judge of the district court to reassign it to another judge." *Id.* at 17a.

That afternoon, Chief Judge Alicemarie H. Stotler of the district court ordered petitioner's case reassigned to Judge King, Dkt. 67, who in turn ordered the case set for a "Status Conference and trial setting." Dkt. 68.

4. On June 20, 2008, petitioner objected to the "trial setting" aspect of Judge King's scheduling order, asserting that "the double jeopardy clause of the Fifth Amendment precludes a retrial of this matter." Dkt. 74 at 1. In response, Judge King ordered briefing on whether to dismiss the indictment on double jeopardy grounds. Dkt. 75.

The district court (Judge King still presiding) denied petitioner's motion to dismiss. Pet. App. 5a-16a. As relevant here, the district court first found that Chief Judge Kozinski had properly recused himself from further participation in petitioner's case. The district court concluded that a reasonable person with knowledge of all the relevant facts and circumstances—including the contents of the June 11 and June 12 *Los Angeles Times* articles, the statements attributed to Chief Judge Kozinski in those articles, Chief Judge Kozinski's on-the-record colloquies with counsel, and Chief Judge Kozinski's self-initiated June 12 request for a Judicial Council investigation—would conclude that Chief Judge Kozinski's impartiality might reasonably be questioned, thus requiring his recusal under 28 U.S.C. 455(a). Pet. App. 8a-11a.

The district court also rejected petitioner's claim that Chief Judge Kozinski erred in declaring a mistrial. Rather, it concluded that "[Chief] Judge Kozinski acted with sound discretion in finding manifest necessity for a mistrial." Pet. App. 15a. In particular, the district court found (1) that Chief Judge Kozinski gave the parties an adequate opportunity to be heard and consider their options, and he was aware of petitioner's opposition to a mistrial, *id.* at 12a; (2) that Chief Judge Kozinski issued his order "not [as] an abrupt reaction to emerging events," but instead as "the result of calm deliberation," *id.* at 14a; and (3) that "the appointment of another judge to complete the trial was not a viable alternative to a mistrial" because the Ninth Circuit had previously held in *United States* v. *Jaramillo*, 745 F.2d 1245, 1248-1249 (1984), cert. denied, 471 U.S. 1066 (1985), that a criminal trial judge's midtrial recusal under Section 455(a) cannot be remedied by the appointment of a new judge to complete the trial but instead requires that a mistrial be declared, Pet. App. 13a-14a.

5. Petitioner took an interlocutory appeal pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals[2] affirmed in an unpublished memorandum disposition. Pet. App. 1a-4a. It first found that the district court "did not err in ruling that [Chief] Judge

[2] The government alerted the court of appeals that petitioner's appeal implicated, to some extent, the actions of its Chief Judge (in his capacity as the trial judge), which were the subject of the then-pending Third Circuit Judicial Council investigation. The notice was intended to allow the judges of the court of appeals to make an informed decision whether they should recuse themselves, and it outlined the procedure under 28 U.S.C. 291(a) for requesting the appointment of out-of-circuit judges to hear and decide petitioner's appeal. Gov't Notice (Oct. 30, 2008). No recusals were noted, see, *e.g.*, Pet. App. 19a-20a, and the appeal was decided by three judges of the Ninth Circuit, see *id.* at 2a.

Kozinski properly recused himself from [petitioner's] case under 28 U.S.C. § 455(a)." *Id.* at 2a. Applying the governing standard—"'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned'"—the court of appeals found that "a well-informed observer may reasonably have questioned [Chief] Judge Kozinski's ability to act as an impartial judge in [petitioner's] trial." *Ibid.* (quoting *Clemens* v. *United States Dist. Court*, 428 F.3d 1175, 1178 (9th Cir. 2005) (per curiam)).

The court of appeals likewise agreed with the district court's conclusion that Chief Judge Kozinski acted within his discretion in determining there was manifest necessity to declare a mistrial. Pet. App. 3a-4a. The court noted that in *United States* v. *Bates*, 917 F.2d 388 (9th Cir. 1990), it had identified several "indicators to examine in determining whether a judge has exercised sound discretion in declaring a mistrial." Pet. App. 3a n.1 (citing *Bates*, 917 F.2d at 395-396). But more importantly, it found that its earlier precedent, *Jaramillo*, *supra*, spoke directly to the manifest necessity of declaring a mistrial following a trial judge's recusal in light of mid-trial revelations (in *Jaramillo*, the indictment of the trial judge). *Id.* at 3a.

In particular, the court of appeals rejected petitioner's argument that a new judge could have continued the trial in Chief Judge Kozinski's stead under Federal Rule of Criminal Procedure 25(a). It explained that just as it had found in *Jaramillo* that "'the designation of another judge * * * would not remove the appearance of partiality concerning all prior rulings and all actions of the [judge],'" so too "[i]n this case, the designation of another judge half way through the proceedings would

not have removed the appearance of partiality concerning [Chief] Judge Kozinski's previous actions in the case." Pet. App. 3a (quoting *Jaramillo*, 745 F.2d at 1249). In summary, the court of appeals agreed that just as in *Jaramillo*, "the extraordinary circumstances of this case required that a mistrial be declared." *Id.* at 4a.

ARGUMENT

Petitioner first contends (Pet. 16-23) that the lower courts erred in determining that Chief Judge Kozinski reasonably recused himself under Section 455(a). Next, he contends (Pet. 23-30) that Chief Judge Kozinski abused his discretion in determining that manifest necessity justified a mistrial. The court of appeals correctly rejected those claims in a factbound unpublished decision. That decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. Before 1974, federal law required a judge to recuse himself only when it was "improper, in his opinion, for him to sit." 28 U.S.C. 455 (1970). Congress revamped this provision in 1974 "to broaden and clarify the grounds for judicial disqualification." Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609; see S. Rep. No. 419, 93d Cong., 1st Sess. 1 (1973) (*1973 Senate Report*); H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1-2 (1974) (*1974 House Report*). In particular, the newly enacted Section 455(a) provided, for the first time, a statutory obligation for a judge to recuse himself from "any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a).

Section 455(a) thus replaced the subjective "in his opinion" standard for recusal with an objective standard

that, "[q]uite simply and quite universally, recusal [i]s required whenever impartiality might reasonably be questioned." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994) (citation omitted). In simplest terms, "if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." *1973 Senate Report* 5; *1974 House Report* 5; see *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (purpose of Section 455(a) was to "promote public confidence in the integrity of the judicial process").

b. Applying these principles (see Pet. App. 8a-11a), the district court correctly concluded that a reasonable, fully informed observer with knowledge of all of the relevant facts and circumstances—*viz.*, the nature of the proceeding, the two news articles, the statements attributed to Chief Judge Kozinski in those articles without dispute, his on-the-record colloquies with counsel, and the fact that he requested a Judicial Council investigation of his conduct—would "conclude that [Chief Judge Kozinski's] impartiality might reasonably be questioned in this case." *Id.* at 11a. The decision to recuse was therefore proper under Section 455(a), and it served to preserve the appearance of impartiality so essential to the criminal justice system. See generally *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). The court of appeals readily reached the same conclusion. Pet. App. 2a.

Petitioner agrees that the question presented is simply "whether or not recusal was mandated by Section 455(a)" on these facts. Pet. 18. While "[p]etitioner submits it was not," *ibid.*, his only legal argument is that the lower courts should have applied a legal standard that (1) fluctuates "depending upon whether the case is a

criminal case or civil case"; (2) requires "a district court judge during the middle of a criminal trial [to] exercise more restraint with respect to self recusal than [in other contexts]"; (3) commands "the trial court judge [to] be more reluctant to recuse himself if the effect of the recusal is a retrial"; and (4) constructs "a continuum with respect to partiality and impartiality." Pet. 17. But nothing in Section 455's text, history, or purpose endorses such distinctions. Rather, the courts below correctly asked the precise question that Section 455(a) poses, and the factbound application of that correct legal standard warrants no further review. Cf. *Sao Paulo State of the Federative Republic of Braz.* v. *American Tobacco, Inc.*, 535 U.S. 229, 232-233 (2002) (per curiam) (summarily reversing when court of appeals erred in concluding that recusal under Section 455(a) was required without considering what "a reasonable person, *knowing all the circumstances*, would [conclude]") (quoting *Liljeberg*, 486 U.S. at 861).

Petitioner suggests that Chief Judge Kozinski's recusal was due merely to his receiving "'a good deal of embarrassing criticism and adverse publicity'" from "the largest newspapers" in the country. Pet. 22 (quoting *Cheney* v. *United States Dist. Court*, 541 U.S. 913, 929 (2004) (memorandum of Scalia, J., denying motion to recuse)). But as both courts below concluded (Pet. App. 2a, 11a), Chief Judge Kozinski's recusal was made—and justified—because a reasonable, fully informed observer considering not only the articles, but also their substance, Chief Judge Kozinski's statements, and his request for a Judicial Council investigation, would conclude that the appearance of impartiality was no longer met in this case.

This Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). There is no such "obvious and exceptional showing" here, and not two, but *three* courts (Chief Judge Kozinski in the first instance, then Judge King on review, and then again the Ninth Circuit on appeal) have reached identical conclusions about the facts here.

2. Petitioner also contends (Pet. 23-30) that declaring a mistrial was not a manifest necessity because, in his view, a replacement judge could have been appointed under Federal Rule of Criminal Procedure 25(a) to complete the trial. The court of appeals correctly held that Chief Judge Kozinski exercised sound discretion in determining there was manifest necessity to declare a mistrial, and its decision does not conflict with any decision of this Court or of another court of appeals.

a. A retrial following a mistrial entered over the defendant's objection is consistent with the Double Jeopardy Clause if there was "manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated." *Illinois* v. *Somerville*, 410 U.S. 458, 461 (1973) (quoting *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). "[T]he key word 'necessity' cannot be interpreted literally"; rather, "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Arizona* v. *Washington*, 434 U.S. 497, 506 (1978). "The 'manifest necessity' standard" reflects a balance of competing in-

terests by "provid[ing] sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgments.'" *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982) (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)).

The phrase "manifest necessity" "do[es] not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Washington*, 434 U.S. at 506. Accordingly, this Court has "consistently reiterated" that "[t]he decision whether to grant a mistrial is reserved to the 'broad discretion' of the trial judge," *Renico* v. *Lett*, No. 09-338 (May 3, 2010), slip op. 6, and that decision is entitled to substantial deference, *id.* at 7.

This Court's opinions suggest a number of considerations bearing on the trial judge's exercise of discretion. See, *e.g.*, *Washington*, 434 U.S. at 507-510, 514-516. With that guidance, lower courts have often considered whether the trial judge "(1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chose[] the alternative least harmful to a defendant's rights, (3) acted deliberately instead of abruptly, and (4) properly determined that the defendant would benefit from the declaration of mistrial." *United States* v. *Bates*, 917 F.2d 388, 395-396 (9th Cir. 1990); accord *United States* v. *Berroa*, 374 F.3d 1053, 1058 (11th Cir. 2004), cert. denied, 543 U.S. 1076 (2005); *United States* v. *Allen*, 984 F.2d 940, 943 & n.5 (8th Cir. 1993); *United States* v. *Cameron*, 953 F.2d 240, 246 (6th Cir. 1992); see also Fed. R. Crim. P. 26.3 ("Before ordering a mistrial, the court must give each defendant and the government an opportunity to

comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."). Those inquiries bear on whether the court exercised sound discretion because a trial court that has considered these factors "is much more likely to have exercised sound discretion in concluding that manifest necessity for a mistrial existed." *United States* v. *Elliot*, 463 F.3d 858, 864 (9th Cir.), cert. denied, 549 U.S. 1021 (2006).

b. Those considerations reveal that Chief Judge Kozinski exercised sound discretion in finding manifest necessity to declare a mistrial. Although it is "not certain whether the mistrial benefitted [petitioner]," Pet. App. 15a, there is no question that Chief Judge Kozinski "heard [petitioner's counsel's] position that he opposed any mistrial," *id.* at 12a, and that Chief Judge Kozinski declared a mistrial only after taking two days for reflection and deliberation.

Petitioner focuses on the existence of alternatives to a mistrial—arguing that his case could have been reassigned to a new judge mid-trial under Rule 25(a). That Rule provides that "[a]ny judge regularly sitting in or assigned to the court may complete a jury trial if * * * the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and * * * the judge completing the trial certifies familiarity with the trial record." Fed. R. Crim. P. 25(a)(1)-(2). Petitioner argues that *United States* v. *Sartori*, 730 F.2d 973 (4th Cir. 1984), holds that Rule 25(a)'s phrase "or other disability" includes the trial judge's inability to proceed because of recusal, while *United States* v. *Jaramillo*, 745 F.2d 1245 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985)—which the court of appeals fol-

lowed here, see Pet. App. 3a-4a—holds that it does not. See Pet. 25-26.

Jaramillo and *Sartori*, however, are factually dissimilar. In *Jaramillo*, the trial judge was himself indicted during the defendant's criminal trial; he declared a mistrial and recused himself from further proceedings. 745 F.2d at 1246-1247. The court of appeals concluded that the Double Jeopardy Clause did not bar the defendant's retrial because there was manifest necessity for the mistrial. *Id.* at 1247-1249. The court rejected the defendant's argument that Rule 25(a) reassignment provided a "less drastic alternative[]" to a mistrial under the circumstances. *Id.* at 1249. Contrasting recusal to the sort of disabilities explicitly addressed in the Rule, the court explained that "neither death nor disabling sickness necessarily affects the integrity of all prior proceedings in the trial" in the way the trial judge's indictment "directly implicate[d] [his] character and integrity" and created "the appearance of partiality concerning all prior rulings and all actions" by the judge. *Ibid.*

By contrast, in *Sartori* the trial judge fully disclosed at an early stage his possible reason for recusal (a leadership role in a non-profit organization related to the subject matter of the defendant's allegedly illegal activities). 730 F.2d at 974. He offered at arraignment to recuse himself, but "neither party * * * objected to his continued participation." *Ibid.* Midway through trial, the judge nonetheless recused himself and declared a mistrial, over all parties' objections. *Id.* at 975. The court of appeals concluded that there was not manifest necessity for a mistrial because "substitution pursuant to Rule 25(a) was a viable alternative in this case." *Ibid.* The court further explained that, given the parties' continuing willingness to consent to the trial judge's partici-

pation despite grounds for his disqualification (a practice approved by 28 U.S.C. 455(e)), "[t]he inquiry was no longer whether his impartiality might reasonably be questioned but instead became whether the risk of an appearance of judicial impropriety constituted manifest necessity for declaring a mistrial." *Sartori*, 730 F.2d at 977. Under the circumstances, that "risk was simply not great enough to constitute manifest necessity." *Ibid.*

In light of their different facts, *Jaramillo* and *Sartori* do not create a conflict warranting this Court's review. As an initial matter, *Jaramillo* is not so categorical as petitioner claims; at most, it holds that Rule 25(a) substitution is not available "[w]here * * * the 'disability' directly implicates the character and integrity of the judge" such that "the designation of another judge would not remove the appearance of partiality concerning all prior rulings and all actions" of the judge. 745 F.2d at 1249. While the circumstances prompting Chief Judge Kozinski's recusal were not as dramatic as in *Jaramillo*, the appearance problem had the same effect of tainting prior rulings, which is why the panel found that "*Jaramillo* is controlling." Pet. App. 3a. By contrast, *Jaramillo* would not control a case with *Sartori*'s facts because the "crux of [*Jaramillo*]," *i.e.*, the inability of reassignment to cure the taint of the recused judge's prior rulings, *ibid.*, was absent in *Sartori*, where the parties had consented all along to the judge's participation.

But even if *Jaramillo* and *Sartori* did diverge on whether Rule 25(a)'s phrase "or other disability" embraces recusal in the abstract, that disagreement would have no relevance in this case. The ultimate constitutional question is whether declaring a mistrial is a manifest necessity in a particular case. In that respect, *Jara-*

millo and *Sartori* are consistent: when reassignment will not clear the cloud over the recused judge's prior rulings, declaring a mistrial is a manifest necessity (*Jaramillo* and this case); but when there is no such concern about prior rulings, reassignment is a complete cure and there is no call for a mistrial (*Sartori*). Whether or not reassignment under Rule 25(a) would be a permissible alternative in some other recusal case, it would not have avoided the need for a mistrial here. Thus, the putative split on the interpretation of Rule 25(a) that petitioner raises is not outcome-determinative in this case, and it does not warrant review. The court of appeals correctly found that manifest necessity existed on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-1365

In the Supreme Court of the United States

IRA ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

A. DISCUSSION OF RENICO v. LETT MAY 3, 2010) 1

B. DISCUSSION OF U.S. v. SARTORI 3

CONCLUSION 5

TABLE OF AUTHORITIES
FEDERAL CASES

Cases

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847(1988) 6

Renico v. Lett, _____ U.S. _____,
No. 09-338 (May 2010) 1, 2, 3, 6

United States v. Jaramillo,
745 F.2d 1245 (9th Cir. 1984), cert.den.,
471 U.S. 1066, 85 L.Ed.2d 499 (1985) 3, 4, 5

United States v. Jorn, 400 U.S.470(1971) 3

United States v. Sartori, 730 F.2d 973
(4th Cir. 1984) 3, 4, 5

Statutes

28 U.S.C.§2254(a)(1) 2
28 U.S.C.§2254(d) 2

PETITIONER'S REPLY BRIEF

A. DISCUSSION OF RENICO v. LETT (MAY 3, 2010)

Petitioner filed his Petition on May 3, 2010 and the Acting Solicitor General filed the Government's Brief in Opposition on May 28, 2010, 13 days ahead of its June 10, 2010 deadline in order to make the June 8, 2010 distribution date. This reduced Petitioner's preparation time because of the intervening three day Memorial Day Weekend. Hopefully the decision to grant or deny certiorari will not be affected by the timing of the Government's response.

This case involves the Double Jeopardy Clause of the Fifth Amendment, which coincidentally was the subject of this Court's 6 to 3 decision filed on the **SAME DAY** that the Petition was filed: May 3, 2010. The Government has cited the case of Renico v. Lett, ___ U.S. ___ No. 09-338 (May 3, 2010) at page 18 of its Brief, but has mischaracterized the majority's decision (by the Chief Justice). Thus, Petitioner needs to reply.

Renico v. Lett, supra, involved federal habeas corpus review of a state court criminal conviction (second degree murder) in a retrial after the first trial ended with a jury deadlock and the state trial court's declaration of a mistrial because of the deadlock.

The Government tries to create the impression that the broad deference to be given to trial court decisions involving mistrial declarations is the same, whether the mistrial results from a jury deadlock or some other reason. A close reading of the majority's opinion in Renico v. Lett, shows the majority was focusing on a

mistrial because of a jury deadlock, not a mistrial because the trial judge was embarrassed by newspaper articles. This Court's majority emphasized that the Supreme Court has never overturned a trial judge's declaration of a mis-trial because the jury was deadlocked.

Moreover, Renico v. Lett , did not involve direct appellate review of the trial's court's mistrial declaration. Rather, the case involved application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d) by a federal habeas corpus court. The majority emphasized this point at the outset of its opinion:

> "It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so — the applicable standard on direct review. The question under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was "an unreasonable application of clearly established Federal law." §2254(a)(1).

This Court's majority made it abundantly clear in Renico v. Lett that this Court's majority did not review the Michigan Supreme Court's decision affirming the conviction for correctness. The majority of this Court expressed its position succinctly:

> ". . . Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in

> this case was correct, it was clearly not unreasonable...."

The majority in Renico v. Lett, did not express any view that would lead any one to conclude that the majority would affirm the Ninth Circuit in the instant case, which does not involve a deadlocked jury (the classical reason for a mistrial) nor does it involve a collateral challenge to a state Supreme Court's judgment affirming a criminal conviction.

Of course, the Ninth Circuit's decision below would not survive scrutiny by Justice Stevens, who dissented in Renico v. Lett, nor by Justices Breyer and Sotomayor, who joined Justice Stevens.

Relying on this Court's decision in United States v. Jorn, 400 U.S. 470 (1971), which ruled a retrial would violate the Double Jeopardy Clause, the dissent displayed great respect for the Double Jeopardy Clause and the interests it protects. The Government has chosen to ignore the Jorn case because it does not fit with the Government's trivialization of this important constitutional safeguard, which contains no exceptions in the text of the Fifth Amendment.

B. DISCUSSION OF U. S. v. SARTORI

The Government minimizes the importance of the Fourth Circuit's decision in United States v. Sartori, 730 F.2d 973 (4th Cir. 1984) and tries to distinguish it from United States v. Jaramillo, 745 F.2d 1245 (9th Cir. 1984), cert.den. 471 U.S. 1066, 85 L.Ed.2d 499 (1985), but the holdings of the two cases are contradictory. In its Brief filed with the Ninth Circuit below, the Government stated, ". . . Sartori conflicts

with Jaramillo. . . ." (Brief for the United States, 9th Cir. No. 08-50423, page 61, footnote 22). They do conflict. The Fourth Circuit expressly stated,

> "The term "other disability" in Rule 25(a) includes disability by reason of recusal. See Bennett v. United States, 285 F.2d 567, 572 (5th Cir. 1960), cert. Denied, 366, U.S. 911, 81 S.Ct. 1087, 6 L.Ed.2d 236 (1961). . . ."

The Government tries to distinguish Sartori from the instant case, but on the material issue of the application of Rule 25(a) there is no difference. The Government argues no one sought the recusal of the district judge in the Sartori case, but no one sought Judge Kozinski's removal or recusal here. The Government referred to a "submission" that it was considering. Similarly, the Government did not seek the Ninth Circuit's recusal, but simply, "alerted the Court of Appeals . . . ." (See Brief For the United States in Opposition, p. 12, footnote 2).

Sartori and the instant case are the same in all material respects, except here the Ninth Circuit chose to follow Jaramillo, a case far different (indictment of a sitting judge, not an embarrassing article) from the instant case.

It is obvious the lower Courts are confused and need guidance from this Court. The law should be clarified by this Court. The word.

CONCLUSION

For the reasons expressed in the Petition and this Reply, certiorari should be granted. There are no factual disputes. The Government has not disputed any fact asserted by Petitioner, whose Statement of the Case was lifted from the Government's Ninth Circuit Brief. Thus, the Government's argument at page 17 of its Opposition that this Court does not grant "certiorari to review evidence and discuss specific facts" is irrelevant. Petitioner has not asked this Court "to review concurrent findings of fact by two courts below. . . ." (Gov't Opposition, p. 17). Petitioner accepts all factual findings, but disagrees with the conclusions drawn by the District Court and the Ninth Circuit.

Obviously this Court considers the grounds for a mistrial when deciding double jeopardy cases.

The Government tries to separate Jaramillo and Sartori, and link Jaramillo to the instant case, but Jaramillo involved a presiding judge's indictment, which pitted the Government against the judge, not an embarrassing newspaper article. The Government states that Judge Kozinski's prior rulings were tainted, but does not point to any. Moreover, the Government asserts that in Sartori, neither party requested the judge's recusal (Gov't Opposition, p. 20), erroneously implying that one of the parties here (i.e., the Government) requested Judge Kozinski to disqualify himself. However, the Government here made no request to Judge Kozinski. Rather, the Government merely told Judge Kozinski's clerk that it

intended to file a "submission" (without indicating what it would say or request, if anything).[1]

Without waiting for the "submission" and Petitioner's response, Judge Kozinski recused himself and declared a mistrial. At no time did Judge Kozinski declare that his impartiality might reasonably be questioned.

Certiorari should be granted to review the undisputed facts for the purpose of deciding this important double jeopardy issue. It was not decided by Renico v. Lett. The issue is open and there is a circuit split.

No case decided by this Court supports a Double Jeopardy violation as a remedy under 28 U.S.C. §455(a). In Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 862 (1988) this Court (Stevens, J.) said section 455 ". . . neither prescribes nor prohibits any particular remedy. . . [and that] . . . Congress has wisely delegated to the judiciary the task of fashioning the remedies. . . ." This Court should fashion the remedy when a defendant in the middle of a criminal jury trial is facing a retrial through no fault of his own because the District Judge unilaterally recuses himself. The remedy should be a replacement judge, especially where the Government does not refer to any prior ruling that it believes was tainted by the self-recused judge.

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[1] The Government at p.22 (footnote 8) of its Brief filed with the Ninth Circuit described the non existent "submission" as a letter (never produced) that would "inform" Judge Kozinski as to whether he should recuse himself.

Respectfully submitted,

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